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Supreme Court of the United States

OCTOBER TERM, 1945

No. 514

JOSH DAVID SMITH, as administrator of the goods, chattels and credits of CHARLES LEE SMITH, deceased; OLIN LEROY POWELL, an infant, by Robert H. Shaw, his guardian ad litem; FRANK T. VADALA, an infant, by Robert H. Shaw, his guardian ad litem; EDWARD WALTERS, an infant, by Robert H. Shaw, his guardian ad litem; WALLACE K. NUNN and EDWARD G. LINDBERG,

Petitioners,

—against—

TOWN OF ORANGETOWN and MAX FRIEDMAN,

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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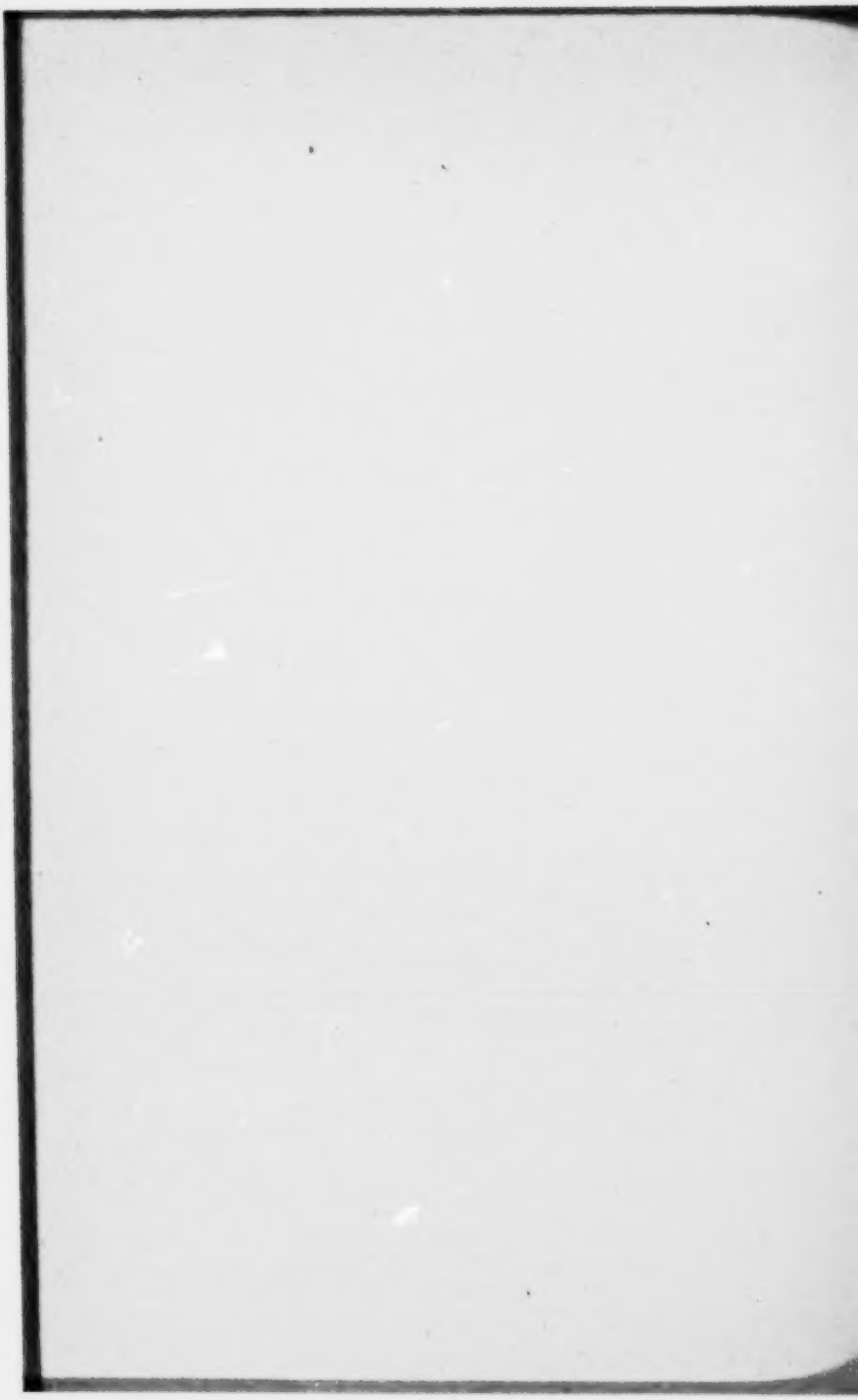

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Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

JOSH DAVID SMITH, as administrator of the goods, chattels and credits of CHARLES LEE SMITH, deceased; OLIN LEROY POWELL, an infant, by Robert H. Shaw, his guardian ad litem; FRANK T. VADALA, an infant, by Robert H. Shaw, his guardian ad litem; EDWARD WALTERS, an infant, by Robert H. Shaw, his guardian ad litem; WALLACE K. NUNN and EDWARD G. LINDBURG,

Petitioners,

—against—

TOWN OF ORANGETOWN and MAX FRIEDMAN,

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Second Circuit:

The petition of your petitioners respectfully shows to this Honorable Court:

Summary Statement of Matter Involved

Petitioners, hereinafter sometimes referred to as plaintiffs, seek to review under Judicial Code, Sec. 240, 28 U. S. C. Sec. 347, a decree of the Circuit Court of Appeals, Second Circuit, dated July 16, 1945, affirming

by a divided court, Clark, C.J., dissenting, a final judgment of the District Court of the United States for the Southern District of New York, entered in favor of defendants upon a verdict following a trial before Moscowitz, J., and a jury (146-150).*

The action is in negligence for the death of Charles Lee Smith, intestate of the plaintiff Josh David Smith, and for injuries to the other plaintiffs. Judisdiction is based upon diversity of citizenship.

On November 22, 1943, at about 9:30 P. M., defendant Friedman crashed with his automobile into the rear of a battalion of soldiers from nearby Camp Shanks, who were on a night-practice march (362, 382-384), killing Smith and severely injuring the others.** The accident occurred in Rockland County, New York, on State Road 9-W, between the Villages of Piermont and Sparkill (655, 656).

Friedman was a member of the Orangetown Police Department (160) and was driving from Nyack to Police Headquarters at Sparkill, in response to an air-raid practice black-out signal (472-474, 524).

The complaint asserts that Friedman operated his car carelessly, negligently and recklessly and that there was no contributory negligence on the part of the deceased or of the injured men (15, 18, 28, 31). These

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*(All references, unless otherwise qualified, are to the folios of the record.)

**(The testimony in respect of the injuries suffered by plaintiffs is omitted from the record and these papers will not discuss the injuries or the treatment given to the men since those facts are not relevant to the questions presented.)

allegations are denied by each defendant, and each answer affirmatively pleads contributory negligence (63, 78, 99).

Each answer also affirmatively pleads immunity from liability under New York State War Emergency Act, Laws, New York, 1942, Ch. 445, amended Ch. 544, Sec. 40, which provides that no person who is "in good faith carrying out, complying with, or attempting to comply with any law or duly promulgated rule, regulation, or order * * * relating to civilian protection, shall be liable for any injury or death to persons or damage to property as a result of such activity". The answers allege that Friedman, in good faith, was carrying out a duly promulgated order relating to civilian protection (80-82, 99-103). The principal question sought to be reviewed is the soundness of the construction placed upon that statute by the Courts below.

The case was tried before Judge Moscowitz and a jury, whose verdict for defendants was rendered following a charge which petitioners claim erroneously required such verdict. Appeal was taken to the Circuit Court of Appeals for the Second Circuit which, Clark, C.J. dissenting with an opinion, affirmed the judgment of the District Court. Augustus N. Hand, C.J., wrote the prevailing opinion. An opinion was written by Judge Moscowitz, reported at 57 Fed. Supp. 52. The opinions of the Circuit Court of Appeals are not reported excepting on the front page of the New York Law Journal of September 14, 1945.

Questions Presented and Reasons Relied on for Allowance of the Writ

I

War measures, such as the New York War Emergency Act, for the protection of civilians, should not be construed as here was done so as to extend their immunity for acts done in carrying out war orders to reckless conduct carried on in wanton disregard of the safety of others. To so construe such statutes creates grave doubts as to their constitutionality.

The question is a novel one of general importance and of public concern which presents a question of Federal law not settled by this Court.

II

The charge of the Trial Court was erroneous in the following respects:

1. The issue of contributory negligence;
2. The effect of New York General Municipal Law, Section 50c;
3. The burden of proof upon the issue of good faith;
4. The undue emphasis upon the fact that Friedman was responding to an air-raid black-out signal.

III

The Trial Court improperly interfered with plaintiffs' counsel's presentation of the case.

IV

Defendants' counsel, on summation, appealed to the jury's prejudices.

V

Under New York State Constitution, the War Emergency Act is not a defense to the action for the death of Smith.

WHEREFORE, your petitioners pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court to review the said decree of the Circuit Court of Appeals for the Second Circuit, affirming said judgment of the District Court of the Southern District of New York, and that your petitioners have such other and further relief as may seem meet and just, and your petitioners will ever pray.

JOSH DAVID SMITH, as administrator of the goods, chattels and credits of CHARLES LEE SMITH, deceased; OLIN LEROY POWELL, an infant, by Robert H. Shaw, his guardian ad litem; FRANK T. VADALA, an infant, by Robert H. Shaw, his guardian ad litem; EDWARD WALTERS, an infant by Robert H. Shaw, his guardian ad litem; WALLACE K. NUNN; EDWARD G. LINDBERG.

By: LEONARD ACKER.

Supreme Court of the United States

OCTOBER TERM, 1945

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Plaintiffs-Petitioners,

—against—

TOWN OF ORANGETOWN and MAX FRIEDMAN,
Defendants-Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinions of the Court Below

The prevailing opinion was written by Augustus N. Hand, C.J., the dissenting opinion by Clark, C.J. They are not reported, except in the New York Law Journal, September 14, 1945. An opinion was written in the District Court by Moscowitz, D.J. (873-902), reported at 57 Fed. Supp. 52.

Jurisdiction

The decree of the Circuit Court of Appeals sought to be reviewed is dated July 16, 1945. The statutory authority under which jurisdiction is invoked is Judicial Code, Section 240, 28 U. S. C. Section 347.

Statement of the Case

The action is in negligence for the death of the intestate of Josh David Smith and for injuries to the other plaintiffs. Federal jurisdiction is based on diversity of citizenship (9).

At about 9:30 P. M. on November 22, 1943, defendant Friedman, driving his automobile, ran into the rear of a column of soldiers on a night-practice march between the Villages of Piermont and Sparkill, Rockland County, New York, killing Smith and injuring the others. The soldiers were from nearby Camp Shanks (362, 382-384, 656). Friedman, a policeman of the Town of Orangetown, was driving from Nyack to report to Police Headquarters at Sparkill in response to a practice air-raid black-out signal (160, 471-474, 524).

The complaint pleads that Friedman was driving negligently and recklessly and that the deceased and the injured men were free from contributory negligence (15, 18, 28, 31). These allegations are denied by defendants (58-62, 63, 78, 87-90). Each defendant also claims immunity under the New York State War Emergency Act, asserting that Friedman, in good faith, was carrying out a duly promulgated order in respect of civilian protection (80-82, 99-103).

A judgment for defendants was entered on a verdict

in their favor following a trial before Moscowitz, J., and a jury in the District Court, Southern District, New York. The Circuit Court of Appeals for the Second Circuit, with Clark, C.J. dissenting with an opinion, affirmed the judgment.

Specification of Errors

The District Court erred in his refusal to set aside the verdict of the jury (873, 901), and the Circuit Court of Appeals erred in its affirmance of that decision and of the judgment entered upon the verdict.

Summary of Argument

I

The Courts below erred in construing a war measure such as the New York War Emergency Statute, enacted for civilian protection, so as to grant immunity to reckless acts committed wantonly and in disregard of the rights and safety of others. Such construction, moreover, raises great doubt as to the statute's constitutionality.

II

The Trial Court erred in his charge to the jury as to (1) the issue of contributory negligence; (2) the effect of New York General Municipal Law, Section 50c; (3) the burden of proof on the issue of Friedman's good faith; and (4) the undue emphasis placed upon the fact that Friedman was responding to an air-raid black-out signal.

III

The Trial Court improperly interfered with plaintiffs' counsel's presentation of the case.

IV

Defendants' trial counsel improperly appealed to the prejudices of the jury in his summation.

V

The War Emergency Statute is not a defense to the action for the death of Smith in view of New York State Constitution, Article 1, Section 16.

POINT I.

War measures, such as the New York War Emergency Act, when properly construed, do not grant immunity for reckless conduct carried on in wanton disregard of the rights and safety of others. Although there was proof from which the jury could have found that Friedman so had acted, the Trial Court's charge erroneously required the jury to find for defendants merely because Friedman was responding to an air-raid signal. The construction thus placed upon the statute creates doubt as to its constitutionality.

The proof was such as to warrant the jury finding

that Friedman had been driving in a reckless manner. Upon air-raid practice black-outs, a "blue" alarm for putting out lights in houses first was sounded (245, 267, 268). Then came a "red" alarm upon which all street lights were put out and automobiles were required to turn off their lights and stop at one side of the road (270). On the occasion herein, the first alarm was sounded at 9:28 P. M. and the second at 9:37 P. M. (736, 747).

Friedman's orders were to report to Police Headquarters at Sparkill upon any black-out (732). He was in a drug store in Nyack on the night of November 22nd when he heard the first siren (473). He walked to his car, which was parked nearby, and drove out of Nyack (476).

In the Village of Piermont, he came to a rise in the road where there was also a curve (485). This was about one-quarter of a mile from the point of the accident (695). The elevation was such that, coming up one side of the hill, one could not see the road on the other side (695). Friedman brought his car almost to a full stop at that point to let another car which "straddled" the road back up sufficiently for him to pass and then drove ahead (485, 486). He then passed two cars in succession, going north, whose headlights temporarily blinded him (486, 648, 650). Nevertheless, he kept driving ahead, merely taking his foot off the accelerator (651, 652).

A battalion of soldiers, from Camp Shanks on a night-march, was moving along the highway at this point (375). Officers to the rear of the battalion had been stopping cars or slowing them down to pass around the marching men (382). When the officers saw Friedman approaching, they jumped and waved to him and

yelled to him to stop (382, 383, 575). Friedman kept right on and struck the rear of the column of men (384, 574, 606).

Friedman testified that, after being blinded by the headlights of the passing cars, all he knew was that he felt the impact of the accident (513, 699). Then he swerved to his left, stopped and got out of his car, saw what had happened, and drove his car off the road, a few feet away (521, 522). He walked back and saw a car standing with two women in it (489). At his request, the women loaned him the use of their car to go to Sparkill Police Headquarters, and he continued along for about a half mile when the "red" black-out siren sounded, requiring all traffic to stop (490, 491, 708).

Plaintiff Powell estimated that Friedman was going fifty to sixty miles per hour at the time of the accident (383). Friedman testified that he started from Nyack at twenty-five miles per hour and that, at the time of the accident, he was doing thirty to thirty-five miles per hour (477, 699).

The uncontrovertible physical facts bear out Powell's estimate. From the drug store in Nyack to the point of the accident was about four and one-half miles (658). Friedman had left the drug store a little after 9:28 P. M. when the first black-out alarm was sounded, had walked to his car, started up, driven along, slowed down to let the car on the road back up to let him pass, started up again, ran into the soldiers, stopped, and got out of his car, walked back to the women's car, secured its use from them, started up and drove another half mile until the "red" alarm at 9:37 P. M. This was all in nine minutes which most clearly indicates a speed of at least sixty miles per hour.

The condition of Friedman's car after the accident, with radiator and fender smashed as if it had struck a stone wall, also is proof of his tremendous speed (193, Exs. 8-A and 8-B). *Allen* v. *Stokes,* 260 App. Div. 600, 23 N. Y. S. (2d) 443.

To maintain such speed when, due to the hill, Friedman could see only a few feet ahead shows an utter disregard for the safety of persons who might be on the road on the other side of the hill. *Pfohl* v. *State,* 42 N. Y. S. (2d) 372. To keep moving at all when he was blinded by the headlights of the passing cars and did not know what was ahead of him, instead of stopping at the side of the road, in itself shows Friedman had no regard at all for what might happen, especially as he knew that troops from Camp Shanks might be on the road for a practice march (671, 672). The courts repeatedly have ruled that when one is thus blinded by headlights of passing cars, he must stop or slow down so that he may immediately stop. (*Freiere* v. *Kaufman,* 241 App. Div. 541, 272 N. Y. S. 316; *Scholing* v. *O'Connor,* 205 App. Div. 720, 200 N. Y. S. 797; *Budnick* v. *Peterson,* 215 Mich. 678; *Woodhead* v. *Wilkinson* (Calif), 185 Pac. 851; *Osbun* v. *De Young* (Court of Errors & Appeals, N. J.), 122 Atl. 809; *Jaquith* v. *Worden,* 73 Wash. 349; *Hammond* v. *Morrison,* 90 N. J. Law 15.

The truth of Friedman's statement that he was blinded and did not see the officers warning him to stop, or the soldiers moving ahead of him, has been assumed. Manifestly, if he saw them or heard the yells to stop, his conduct was tantamount to deliberate assault.

War measures such as the New York War Emergency Statute, Section 40, should not be construed so as to grant immunity to persons who act recklessly and with disregard and heedlessness of the safety of others.

Section 40 of the New York War Emergency Statute provides that no person who is "in good faith, carrying out, complying with, or attempting to comply with any law or duly promulgated rule, regulation or order * * * relating to civilian protection shall be liable for any injury or death to persons or damage to property as the result of such activity".

The question presented is whether such statute should be extended to conduct such as the jury could have found Friedman had been guilty of, which displays a "what do I care what happens" attitude on the part of the one carrying out a war order and thus a complete disregard of the safety of others, especially when the statute requires "good faith" as a condition of immunity. Like provisions, requiring "good faith" as a condition of immunity, are found in other State War Emergency statutes. See e.g. *Laws, New Jersey,* 1942, Ch. 251, Sec. 20, p. 690; N. J. Rev. Stat. A. Ch. 9-52.

The phrase "in good faith" is properly to be given effect, for words in a statute are not to be rejected as superfluous. *Platt* v. *Union Pacific R. R. Co.,* 99 U. S. 48, 58; *Palmer* v. *Van Santvoord,* 153 N. Y. 612, 616.

The phrase "in good faith" obviously does not mean that the person shall honestly believe he is carrying out some order for civilian defense. Though he so believed, if he was in error, and, for example, was responding to what he supposed was an air-raid signal,

when none had been given, it is clear he would not come within the protection of the statute. Fairly construed, the words refer to the person's conduct while he is in fact carrying out an order for civilian protection, and not to an honest intent to respond to some such order. A reckless and wanton disregard for the safety of others properly may not be deemed good faith, for the utilization of an "alert" as an excuse for a "what do I care what happens" attitude in driving a car clearly is not acting "in good faith".

In interpreting other statutes, unreasonableness has been held equal to lack of good faith. *Fidelity Assurance Assn.* v. *Sims*, 318 U. S. 608, 618.

In the Law of defamation, malice includes "such a wanton and reckless disregard of the rights of another as is ill will's equivalent". *Pecue* v. *Collins*, 204 App. Div. 142, 197 N. Y. S. 835; *Crane* v. *Bennett*, 177 N. Y. 106, 114, 115; *De Voy* v. *Irish World, etc., Inc.*, 208 App. Div. 319, 203 N. Y. S. 369; *Sutphin* v. *New York Times Co.*, 138 App. Div. 487, 122 N. Y. S. 833, aff'd 203 N. Y. 645.

The proof warranted a finding that Friedman was guilty of driving recklessly, in disregard of the rights of others who might be upon the road and such conduct is not simple negligence but constitutes the criminal offense of reckless driving. *New York Vehicle & Traffic Law*, Sec. 58; *People* v. *Grogan*, 260 N. Y. 138; *People* v. *Gardner*, 255 App. Div. 683, 8 N. Y. S. (2d) 917. In *District of Columbia* v. *Colts*, 282 U. S. 63, this Court pointed out that the act of reckless driving is "*malum per se*" and was "an indictable offense at common law" and it "cannot be described otherwise than as a grave offense".

The general rules of statutory interpretation support a construction which precludes such reckless misconduct from the coverage of the statute.

Section 40, being in derogation of the common law, is strictly to be construed so as to change the common law no further than required. *Shaw* v. *Railroad Company*, 101 U. S. 557; *Transit Commission* v. *Long Island R. R. Co.*, 253 N. Y. 345.

Statutes likewise are to be interpreted so as to avoid unwise, injurious, absurd, unjust or inconvenient results. *Hagger Co.* v. *Helvering*, 308 U. S. 389; *Sorrels* v. *United States*, 287 U. S. 435; *Lake Shore & Michigan Southern R. Co.* v. *Rouch*, 80 N. Y. 340; *Jewish Hospital of Brooklyn* v. *Doe*, 252 App. Div. 581, 300 N. Y. S. 1111.

To interpret a statute passed for the protection of the civilian population during war times as giving immunity, for example, to air-raid wardens who drive their automobiles in complete disregard of the safety of others, would be a palpable absurdity, especially in view of the rule that emergency vehicles, like all others, must exercise care. *Van Ingen* v. *Jewish Hospital*, 182 App. Div. 10, 169 N. Y. S. 412, aff'd. 227 N. Y. 665; *Farrell* v. *Fire Insurance Salvage Corps*, 189 App. Div. 795, 179 N. Y. S. 477; *Muhs* v. *Fire Insurance Salvage Corps*, 89 App. Div. 389, 85 N. Y. S. 911; *Miller* v. *City of Albany*, 158 Misc. 720, 287 N. Y. S. 889, aff'd. 247 App. Div. 848, 286 N. Y. S. 326.

Order No. 17 of the New York State War Council (857-861) itself demonstrates that reasonableness of conduct properly is the test of "good faith" under Section 40 when the operation of a motor vehicle is involved. That order first sets a limit of thirty-five miles per hour for any distance over a quarter of a mile; it then

provides that this limit is not applicable to vehicles driven in an emergency for the protection of life, health or public safety "provided that this paragraph shall not be so construed as to authorize any such motor vehicle to be driven or operated at a rate of speed in excess of that which is reasonable under conditions prevailing at such time".

Unquestionably, the promotion of the war effort is of paramount importance during time of war. Nevertheless, it would seem proper, as plaintiffs requested the District Court to charge the jury (840), to draw a line at some point under a statute such as that herein and not grant a blanket immunity to persons carrying out measures enacted for the protection of the civilian population, even though they are proceeding in complete disregard of the safety of others. This is the view taken by Judge Clark in his dissenting opinion. This, likewise, appears to be the view taken by the Circuit Court of Appeals for the Second Circuit in *Gaglio* v. *City of New York*, 143 Fed. 2d 904. In that case the Court, ruling that the statute was a defense, distinguished *Jones* v. *Gray*, 267 App. Div. 242, 45 N. Y. S. (2d) 519, since in the *Jones* case "the air-raid warden was conducting himself so recklessly that there was sufficient evidence to support the jury's finding that he was not acting in good faith". The Court thus made the manner of conduct the test of good faith.

The Trial Court, as affirmed by the Circuit Court of Appeals, construed the statute as granting blanket immunity. The Trial Court's charge, in effect, was a direction of a verdict for defendants.

Whether a person has acted in good faith, in general is a question of fact for the jury. *Title Guarantee & Surety Co.* v. *Nichols*, 224 U. S. 346; *Rowe* v. *United States*, 164 U. S. 546; *Kelso* v. *Ellis*, 224 N. Y. 528.

The Court first charged the jury that plaintiffs must establish that Friedman had been negligent (772, 773, 776). Then he instructed them that Section 40 exonerated defendants from liability unless they also found he was guilty of lack of good faith in the performance of his duty (804-806). The Court then defined good faith as being faithful to one's duty or else honesty of purpose and intent (807, 808). He already had charged that there was no dispute as to Friedman's duty and obligation to report upon hearing the "blue" signal (783, 784) so that the charge withdrew from the jury the issue of whether Friedman had not so recklessly disregarded the safety of others on the road that he could not have been deemed to have acted in good faith though he honestly intended to respond to the "alert" signal and it amounted to the direction of a verdict for defendants. The Court further erroneously refused to charge, upon plaintiff's request, that the statute would not grant defendants the privilege to operate a motor vehicle without regard for the safety of persons upon the highway or in a dangerous, reckless or wanton manner (830, 839, 840).

The charge and the refusal to charge were reversible error since they withdrew from the jury's consideration a material issue of fact. *The City* v. *Babcock*, 3 Wall.

240, 244; *Bank of Leavenworth* v. *Hunt*, 11 Wall, 391. The proof fairly presented the question of whether Friedman was acting in good faith in view of the reckless manner in which he was driving and the charge was error since it was equivalent to the direction of a verdict. *United States* v. *Murdock*, 290 U. S. 389, 394; *Best* v. *District of Columbia*, 291 U. S. 411, 4[illegible].

The charge permitted the jury to find for defendants though they could have found that Friedman ran down plaintiffs in reckless disregard of their rights. The result reached therefore may be sustained only if the statute exempts persons from liability in such a situation and, properly construed, it does not so do. *Viereck* v. *United States*, 318 U. S. 236.

The construction of the statute adopted below creates doubt as to its constitutionality and such construction should be avoided if possible.

The question appears not to have been squarely passed upon but in sustaining the validity of the New York Workmen's Compensation Law, this Court expressed the view that it is doubtful whether a legislature may destroy the common-law action in negligence for personal injuries without providing some adequate substitute. *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 201, 205.

Because a statute is a war measure does not free a legislature from constitutional restrictions. *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81; *Sutherland* v. *Mayer*, 271 U. S. 272, 288.

To extend Section 40 to acts of wanton recklessness, as the Courts below did, would appear to make the statute violate the due process clause. In *Twining* v. *New Jersey*, 211 U. S. 78, 101, this Court ruled: "The

words 'due process of law' were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the Union may disregard."

To the same effect, see: *United States* v. *Cruikshank,* 92 U. S. 542, 544.

Furthermore, due process requires that a law shall not be unreasonable, arbitrary, or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained. *Nebbia* v. *New York,* 291 U. S. 502, 525, 539; *Treigle* v. *Acme Homestead Association,* 297 U. S. 189, 197.

It may be assumed for the argument that the legislature validly could exempt a person from liability for simple neglect while responding to some war order.

Heedlessness and recklessness, however, involve more than ordinary negligence. *Olefsky* v. *Ludwig,* 242 App. Div. 637, 272 N. Y. S. 158; *District of Columbia* v. *Colts,* 282 U. S. 63. There clearly is no need for exempting persons from acts of criminal recklessness whereby the safety of the community is endangered and the act would appear to violate the due process clause were it extended to such conduct, even though it were valid in respect of simple negligence. The statute was passed for the protection of citizens who remained in this country during war time and assuming *arguendo,* that the States retain any power to enact legislation for the promotion of the war effort, and, that such power is not exclusively in the Federal Congress, under United States Constitu-

tion, Article I, Section 8, the whole purpose of the legislation would be frustrated if its immunity was extended to that point where air-raid wardens and others could use defense orders as an excuse for proceeding in utter disregard of the safety of others.

The result below thus violates the rule that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score". *United States* v. *LaFranca*, 282 U. S. 568, 575; *I. C. C.* v. *Oregon-Washington R. Co.*, 288 U. S. 14, 40.

POINT II.

The Trial Court committed numerous other errors in his instructions to the jury.

The Issue of Contributory Negligence

The men had been ordered by their commanding officers to march three abreast on the right side of the road and, of course, had to obey orders (312, 314, 322-324). On the night in question, they were so marching in accord with their orders (364, 413).

New York Vehicle & Traffic Law, Sec. 85 (6) provides that pedestrians on the traveled part of a roadway "shall keep to the left of the center line thereof * * *". The Court first correctly charged that because the men were on the right side of the road, could not be deemed contributory negligence since they were soldiers marching under orders (768, 769). The effect of the correct charge was, destroyed by the next in-

struction that the jury might "consider the fact that they were on the so-called wrong side of the road in determining the question of negligence of Friedman, the driver of the automobile. That is, I mean the circumstances whether he expected to find someone there. That would only go to the question of his neglect, if any" (770).

The purpose of Section 85 (6) is that pedestrians shall face traffic approaching them so as better to care for their safety. *Tedla* v. *Ellman,* 280 N. Y. 124.

Friedman knew that men from Camp Shanks were accustomed to taking night marches (672) and he could have "expected" to find men marching to the north as well as to the south, as was the battalion here. Men moving north, and on the left of the road, in compliance with the statute, would have been in front of him exactly as were the men herein except that their faces, instead of their back, would have been towards him. That the battalion was on the "wrong side" of the road, had no bearing upon how Friedman conducted himself and so had none on the question of his neglect for, so far as his conduct is concerned, the accident would have occurred whether the men on the road had their faces or backs to him.

That the men were on the "wrong" side of the road did not affect Friedman's obligation to use due care. *Shuman* v. *Hall,* 246 N. Y. 51; *Lee* v. *City Brewing Corp.,* 279 N. Y. 380, 389. Friedman's ability to see the men ahead of him was not affected by the fact that they happened to have their backs and not their faces towards him.

The only issue, as to which direction the men were facing relates, is whether they would have seen Friedman in time to avoid the accident had they been fac-

ing the other way, so that the side of the road on which they were marching can go only to the issue of their own and not of Friedman's negligence. It was, therefore, error to permit the jury to consider the statute in connection with Friedman's negligence. *Cohen* v. *A. Goodman & Sons,* 189 App. Div. 209, 178 N. Y. S. 528.

The men were soldiers, obligated to march as they were instructed, and so in this case the statute could not be considered in respect of the men's alleged contributory negligence.

The charge furthermore was error since the jury may well have found that Friedman, in the exercise of due care, should have seen the officers in the rear of the column waving and shouting to him to stop. The charge, therefore, violated the rule that one is under a duty to look where he is going. *McDade* v. *International Ry. Co.,* 235 N. Y. 11; *Herbert* v. *W. H. Smith Paper Corp.,* 243 A. D. 260, 276 N. Y. S. 820.

And, had the jury found that Friedman knew of the presence of the men then, even assuming the plaintiffs were negligent, the charge was erroneous for it violated the rule that one who becomes aware of another's peril and has the last clear chance to avoid an accident by using reasonable care is liable although the injured party put himself in the place of danger through his own neglect. *Storr* v. *N. Y. Central R. R.,* 261 N. Y. 348, 351.

The Additional Charge on Contributory Negligence

The Court further charged that if plaintiffs "were guilty of contributory negligence, they cannot recover" (774).

The only fact shown which could form any possible basis for a finding of contributory negligence, was that the men were marching on the right side of the road. There is nothing to show they had any opportunity to see or hear Friedman in time to avoid the accident. The charge, even though it may correctly state the general rule of law, is error for instructions never should be given on a hypothetical or abstract proposition on which there is no proof. *Heines* v. *McLaughlin,* 135 U. S. 584, 598; *Bryan* v. *United States,* 1 Black 140.

To first charge that a violation of Section 85 (6) was not contributory negligence and then give a conflicting instruction by leaving the question of contributory negligence to the jury when the violation of that statute was the only possible basis for a finding of contributory negligence necessarily must have misled and confused the jury and for that additional reason the charge was error. *United States* v. *Local 807,* 315 U. S. 521, 539; *Schutz* v. *Jordan,* 141 U. S. 213; *Rea* v. *Missouri,* 84 U. S. 532, 533.

The Effect of New York General Municipal Law, Section 50c

Friedman pleaded a cross-complaint against the Town of Orangetown under New York General Municipal Law, Sec. 50c (104-109). That section provides that every municipality "shall be liable for and shall assume the liability to the extent that it shall save harmless any duly appointed policeman or fireman * * * for the negligence of such appointee in the operation of a vehicle upon the public streets or highways of the municipality in the discharge of a statutory duty * * *".

The Court, referring to this statute, charged "this law makes the City, Town or Village liable for the

negligence of the policeman or fireman and exonerates and exempts the police officer even though he be negligent" (783). The Court further charged that Friedman and the Town would be liable to plaintiff for any negligence but coupled this with the proposition "that Friedman would not be required to pay the judgment but he could look to the city or the town in this instance for payment. That is, the town would save and hold him harmless" (784, 785).

While the statute gives a police officer a right to exoneration against a municipality, it does not relieve him from liability to a person he has injured by his negligence and he and the municipality are jointly and severally liable to the injured party. *Diamond* v. *City of New York,* 264 A. D. 342, 35 N. Y. S. (2d) 377.

The seriousness of the error in the charge is apparent. The language was such that the jury was bound to find for Friedman even though they found he was negligent, that he was acting in bad faith, and that plaintiffs were not contributorily negligent, for they were instructed that the statute "exempts" the officer. The subsequent instruction that the Town and Friedman would be liable to plaintiffs for negligence could not suffice to overcome the error, especially since it was coupled with the erroneous instruction "that Friedman would not be required to pay the judgment" so that any jury, in all probability, would feel that it would be senseless to render a verdict against him. In effect, they were directed to find for Friedman and were likewise bound to find for the Town, for a verdict for the officer and against the Town would have been inconsistent and improper. *Frascone* v. *Louderback,* 153 App. Div. 199, 138 N. Y. S. 370, aff'd. 208 N. Y. 631.

The Burden of Proof as to Friedman's Good Faith

The Court first charged that plaintiffs could recover only if Friedman was guilty of lack of good faith and that "the burden of proof of showing the absence of good faith is on the plaintiffs" (806). This was error as the one pleading an affirmative defense which asserts he has acted in good faith has the burden of so proving. *Wright-Blodgett Co.* v. *United States,* 236 U. S. 397, 403.

After the completion of the charge, the following occurred: Mr. Mack: "There is a correction to your Honor's charge and it is merely a correction * * * your Honor said in substance that the burden of proof of absence of good faith is on the defendant and what your Honor meant to say was the burden of proof of good faith was on the defendant". The Court: "Yes, of course. The defendant must prove good faith. I thought I had said that. Of course that is so, if I did state otherwise" (825).

The Court thus "corrected" an instruction which had not been given and then gave a proper instruction. Such inconsistent instructions which tend to mislead or confuse the jury are error. *Deserant* v. *Cerillos Coal R. R. Co.,* 178 U. S. 409, 420; *District of Columbia* v. *McElligott,* 117 U. S. 621, 630.

The Undue Emphasis Placed Upon the Fact That Friedman was Responding to an Air-Raid Alarm Signal

The Court, pointing out that Friedman was responding to an air-raid signal, charged "and for aught he knew, according to the evidence, or for aught anyone

knew, it might have been a real raid; the Japanese and Germans might have been overhead * * *. But just assuming that we were attacked overhead by airplanes and had not had any previous drills, can you imagine the amount of panic, riot, death, injuries that would occur? * * * I believe from this evidence that there was nothing to determine whether the officer knew it was a real black-out or whether it was merely a practice black-out" (787, 789).

Friedman did testify that he did not know whether the signal to which he was responding was "for a real black-out or a practice black-out" (645). It is hard to believe, however, that in November, 1943, he was driving along in the belief that Japanese or German airplanes were overhead, about to raid upper New York State. Whether he did so believe, at best, was for the jury, and the phrasing of the charge was such that it failed to leave that issue with the jury. *United States* v. *Murdock,* 290 U. S. 389.

The charge, furthermore, amounted to a summation by the Court on behalf of defendants and violated the rule that it is the duty of the trial judge, in expressing opinion on the evidence, to in no way mislead and especially not to be one-sided. *Quercia* v. *United States,* 289 U. S. 466, 470; *Rio Grande Western Railway Co.* v. *Leak,* 163 U. S. 280.

In the Court below defendants urged that plaintiffs had not at the trial properly raised the questions of the errors in the Court's charge referred to herein so that they were not the subject of review.

The doctrine in respect of the need of raising points at the trial, to entitle a party to review errors, is one of discretion and the Appellate Courts have the power to review errors though the point has not been raised

below. *Washington Railroad* v. *Bradley,* 10 Wall. 299; *American Legion Post No. 90* v. *First National Bank & T. Co.,* 113 Fed. (2d) 868; *Stoltz* v. *United States,* 99 Fed. (2d) 283. This rule applies to errors in a charge as to others. *Delaware & H. R. Corporation* v. *Cottrell,* 69 Fed. (2d) 195.

It is held therefore that plain errors will be noticed and corrected despite a failure to raise a proposition in the Court below. *Stromberg Motor Devices Co.* v. *Zenith-Detroit Corp.,* 73 Fed. (2d) 62.

This is especially the case in regard to a plain error when there has been a clear injustice. *Hormel* v. *Helvering,* 312 U. S. 552; *Pierce* v. *United States,* 255 U. S. 398; *United States* v. *Tennessee & Coosa R. Co.,* 176 U. S. 242; *Helvering* v. *Rubenstein,* 124 Fed. (2d) 969; *Trapp* v. *Metropolitan Life Insurance Co.,* 70 Fed. (2d) 976; *Ayers* v. *United States,* 58 Fed. (2d) 607.

This rule applies to errors in a charge as to other errors. *O'Connor* v. *Ludlam,* 92 Fed. (2d) 50; *Fricke* v. *General Accident Fire & Life Assurance Corp.,* 59 Fed. (2d) 563; *Feldmann* v. *Connecticut Mutual Life Ins. Co.,* 142 Fed. (2d) 628; *Shokuwan Shimabukuro* v. *Higeyoshi Nagayama,* 140 Fed. (2d) 13.

Likewise, it is the rule when, as in this case, issues have been disposed of or a case has been submitted to a jury upon a fundamentally erroneous theory, that there is no need to take exception, upon the theory that to have so done would have been futile. *Railroad Company* v. *Reeves,* 10 Wall. 176, 189; *Fourth National Bank* v. *Francklyn,* 120 U. S. 747, 751; *Sacks* v. *Stecker,* 60 Fed. (2d) 73; *National Fire Insurance Co.* v. *School District No. 68,* 115 Fed. (2d) 232; *Sweeny* v. *United Feature Syndicate,* 129 Fed. (2d) 904.

POINT III.

The Trial Court improperly interfered with plaintiffs' counsel's presentation of the case.

Throughout the trial, the Court displayed impatience with plaintiffs' counsel and continually interfered with his presentation of the case, and the Court's interruptions were such as to repeatedly indicate to the jury that he believed plaintiffs' counsel was asking improper questions, even though no objection had been made by defendants' counsel. See e.g. 161, 162, 165, 209, 240, 248, 306, 312, 313, 316, 365, 368, 369, 391, 425, 437 443, 447, 455, 705.

The Court, furthermore, permitted counsel for the Town of Orangetown repeatedly to interrupt and to break in upon plaintiffs' counsel's questioning of witnesses. See e.g. 161, 170, 171, 172, 175-180, 239, 285-287, 443.

The Court's interruptions interfered with the presentation of plaintiffs' proof and it is error thus repeatedly to interfere with counsel's presentation of a case. *Sprinkle* v. *Davis*, 111 Fed. (2d) 925.

The Court's attitude herein, moreover, as reflected by his interruptions, necessarily must have affected the jury to plaintiffs' prejudice.

POINT IV.

Counsel for the Town of Orangetown improperly appealed to the jury's prejudice in his summation.

In his summation, counsel for the Town of Orangetown stated: "And when you say, 'who is going to pay these boys?', the answer is 'the United States Government'." (754).

Objection was at once taken and the propriety of the objection was recognized both by the Court and defendant's counsel (755). Nevertheless, counsel continued, after referring to the fact that Friedman was driving on a practice black-out and that "it might have been real, he might have saved thousands of lives", and after referring to the War Emergency Statute that "if you find both were acting sincerely, then under our statute it quite naturally follows that all you have to do, as I see it, is to relegate these boys to the great and glorious government under which we live, to make such provision and such compensation for them as the great government of the United States, in its majesty, in its wholeheartedness and in its sincerity, should make for their rehabitation" (756-758).

Such arguments, which are not fair comment on the evidence and have the purpose and effect of influencing the jury by appealing to passion or prejudice, are reversible error. *Viereck* v. *United States*, 318 U. S. 236; *Berger* v. *United States*, 295 U. S. 78; *New York Central R. R. Co.* v. *Johnson*, 279 U. S. 310.

In the Court below, defendants urged that plaintiffs

had waived the error in counsel's summation by not asking for a mistrial. But objection to the argument duly was made and indeed it is the Court's duty, irrespective even of an objection, to prevent appeals to the passions or prejudices of the jury. *New York Central R. R. Co.* v. *Johnson*, 279 U. S. 310. Thus, even though no objection has been taken to the summation, a judgment will be reversed when a verdict has been the result of appeals to the passions or prejudices of a jury. *Metropolitan Life Insurance Co.* v. *Banion*, 106 Fed. (2d) 561.

POINT V.

The War Emergency Statute is no defense to the action for the death of Smith.

New York State Constitution, Art. I, Sec. 16, provides:

> "The right of action now existing to recover damages for injuries resulting in death shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."

The New York Courts rule that this provision takes from the Legislature the power to abrogate the common law remedy for injuries resulting in death without supplying a substitute remedy. *Warren* v. *Morse Dry Dock & Repair Co.*, 235 N. Y. 445, 448; *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 111; *Hanke* v. *New York Consol. R. Co.*, 181 App. Div. 53, 168 N. Y. S. 234; *Travelers Insurance Co.* v. *Padula Co.*, 224 N. Y., 397, 406; *Rosin* v. *Lidgewood Mfg. Co.*, 89 App. Div. 245, 86 N. Y. S. 49; *Medinger*

v. *Brooklyn Heights R. Co.*, 6 App. Div. 42, 39 N. Y. S. 613; *O'Reilly* v. *Utah, Nevada & California Stage Co.*, 87 Hun. 406, 34 N. Y. S. 358.

It follows that Section 40 of the War Emergency Statute is ineffective so far as concerns the cause of action for the death of Smith and that it was improper to permit the jury to consider the statute in connection with that cause of action.

CONCLUSION

It is respectfully submitted that the writ of certiorari prayed for should be granted, since the question here involved is not merely of interest to the litigants, but rather of great general importance. Therefore there is presented a proper occasion for the exercise of the supervisory power of this Court.

Respectfully submitted,

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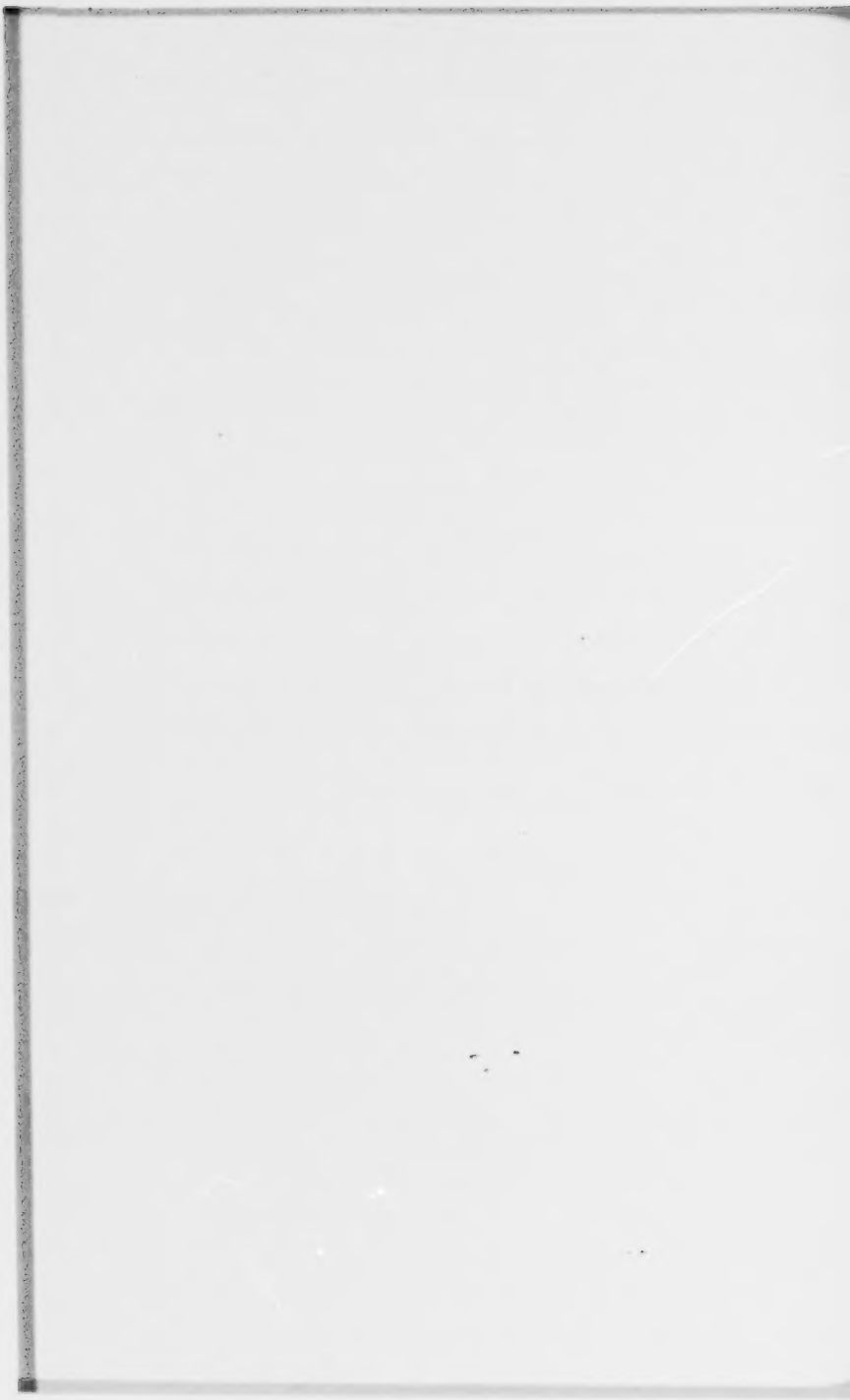
October 2nd, 1945.



NOV 2 1945
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM 1945

No. 514

JOSH DAVID SMITH, as administrator of the goods, chattels and credits of CHARLES LEE SMITH, deceased; OLIN LEROY POWELL, an infant, by Robert H. Shaw, his guardian ad litem; FRANK T. VADALA, an infant, by Robert H. Shaw, his guardian ad litem; EDWARD WALTERS, an infant, by Robert H. Shaw, his guardian ad litem; WALLACE K. NUNN and EDWARD G. LINDBERG,

Petitioners,

against

TOWN OF ORANGETOWN and MAX FRIEDMAN,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRED H. REES
of Counsel.

WILLIAM G. WALSH
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GEORGE S. WRITER, JR.
JOSEPH A. McCABE
On the brief for Respondents Town of Orangetown and Max Friedman

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Supreme Court of the United States

OCTOBER TERM 1945

No.

JOSH DAVID SMITH, as administrator of the goods, chattels and credits of CHARLES LEE SMITH, deceased; OLIN LEROY POWELL, an infant, by Robert H. Shaw, his guardian ad litem; FRANK T. VADALA, an infant, by Robert H. Shaw, his guardian ad litem; EDWARD WALTERS, an infant, by Robert H. Shaw, his guardian ad litem; WALLACE K. NUNN and EDWARD G. LINDBERG,

Petitioners,

against

TOWN OF ORANGETOWN and MAX FRIEDMAN,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The prevailing opinion of the Second Circuit Court of Appeals, written by Augustus Hand, C. J. (306), and the dissenting opinion by Clark, C. J. (315), are not reported except in the New York Law Journal of September 14, 1945.

The opinion of the District Court, written by Moscowitz, D. J. (873-902) is reported in 57 Fed. Supp. 52.

Jurisdiction

The opinion of the Circuit Court of Appeals (306) was rendered July 16, 1945, and the decree of that court (318) sought to be reviewed, was entered July 16, 1945.

Jurisdiction of this Court is invoked under Sec. 24 of the *Judicial Code* (28 U. S. C. A. Sec. 347).

Statement

Petitioners (plaintiffs) seek to review a decree of the Second Circuit Court of Appeals, affirming, by a divided court (Clark, C. J., dissenting), a final judgment of the District Court of the United States for the Southern District of New York (Moscowitz, D. J.), in favor of the respondents (defendants) entered upon the general verdict of a jury.

Plaintiffs sued to recover damages growing out of an accident which occurred on the evening of November 22, 1943, when a motor vehicle, owned and operated by the defendant Max Friedman, a police officer of the Town of Orangetown, struck Charles Lee Smith (now deceased) and the five other plaintiffs, all of whom, as enlisted men in the United States Army, were marching south upon a state highway (9W) in Rockland County, New York, with a battalion of soldiers from nearby Camp Shanks.

The defendant, Max Friedman, was operating his privately owned automobile in a southerly direction along this highway, and at the time of the collision Charles Lee Smith (deceased) and the other five plaintiffs were marching south along the highway in front of the Friedman vehicle. Under orders of their commanding officer, they were marching to the right of the center of the highway, which incidentally was in contravention of Sec. 85 of the *Vehicle and Traffic Law* of the State of New York, which by its

terms directs that pedestrian traffic shall keep to the left of the center lane of the highway. In other words, these soldiers were walking with the traffic instead of against it, as required by that statute.

The accident occurred during the course of an air-raid blackout alarm. Friedman, as a member of the police department of the Town of Orangetown, Rockland County, was under orders to report at police headquarters in Sparkill if a blackout alarm sounded. When the siren sounded, on the night in question, he was off duty, and in a drugstore in Nyack. Upon the sounding of the siren, and in compliance with the orders he had received, he left the store in Nyack, got into his own car, and proceeded by the most direct route from Nyack to Sparkill. While endeavoring to reach his post, he had the misfortune to collide with these soldiers, who happened to have been marching on the wrong side of the road.

Pleadings

The complaint sets up separate causes of action on behalf of the six plaintiffs. After alleging that the Town of Orangetown is a municipal corporation in Rockland County, N. Y. (8), and that the defendant Max Friedman was one of its police officers (10), and after alleging that the motor vehicle, driven by the police officer, was his privately owned car (11), the complaint then sets forth that the defendant town is answerable for Friedman's alleged negligent operation of the vehicle, because he was operating it, on the night in question, in the performance and furtherance of his duties as a police officer of the township, and within the scope of his employment (13).

The answer of the defendant Friedman, after denying the material allegations of the complaint, and after alleging contributory negligence (90, 99), then alleges, by way of defense, that by reason of the *New York State War*

Emergency Act, Sec. 40, he is immune from liability, since, at the time of the accident, he was engaged in performing his duties as a police officer in the Town of Orangetown, and was, "in good faith", complying with, and carrying out, a rule, regulation, or order issued by the Federal or State Military Authorities relating to civilian protection (102, 103).

Friedman also incorporates in his answer a cross-complaint against his co-defendant, Town of Orangetown (104), based upon Sec. 50-c of the *General Municipal Law* of the State of New York, which provides in substance that a city, town or village shall be liable for, and shall assume the liability to the extent that it shall save harmless any duly appointed policeman for the negligence of such policeman in the operation of a vehicle in the discharge of a statutory duty imposed upon such policeman or municipality, provided the policeman, at the time of the accident, was acting in performance of his duties and within the scope of his employment.

Thus, Friedman, in his answer, not only asks that the complaint be dismissed, but demands that, if judgment should go against him, he recover over against the Town of Orangetown for the amount of the judgment (108, 109).

The answer of the defendant Town of Orangetown, after denying the material allegations of the complaint, and after alleging contributory negligence (63, 78), likewise alleges, by way of defense, that by reason of the *New York State War Emergency Act,* Sec. 40, it is immune from liability as a municipal corporation, since, both the township itself and police officer Friedman were acting, on the night in question, "in good faith" in complying with, and carrying out, a rule, regulation or order issued by the Federal or State Military Authorities relating to civilian protection (81-82).

The Trial and Proceedings Thereafter

After a fair and impartial trial before Judge Moscowitz, D. J., and a jury, which lasted five days (4), and a charge (760), which we submit was free of error, the jury returned a general verdict in favor of both defendants (834). Upon the coming in of the verdict, counsel for the plaintiffs immediately moved to set it aside as being contrary to the law and contrary to the evidence (834). After the submission of briefs by all parties, Judge Moscowitz denied plaintiffs' motion (151), explaining in a written opinion (871) his reasons for refusing to disturb the verdict. Judgment was thereupon entered in favor of the defendants (145). Plaintiffs then appealed to the Second Circuit Court of Appeals, which affirmed the judgment by a divided court, with Clark, C. J., dissenting.

The plaintiffs now file a petition for a writ of certiorari and a brief enumerating various questions of law, which they desire to have reviewed by this Court. They give no reason in their petition or brief why any of these questions supply the basis for the allowance of the Writ, with the exception of the first question, which challenges the constitutionality of the *New York War Emergency Act*, and which they say presents an important question of Federal Law not settled by this Court.

POINT I

The findings of fact embodied in the verdict.
The limited power of the United States Supreme Court and the Circuit Court of Appeals in reviewing facts.
Questions not raised below are not reviewable.

Before discussing with particularity the different points raised by our adversaries, we believe it would be helpful to preface our discussion with a reference to certain basic

principles pertaining to appellate procedure, which cut across all the questions submitted for review by the petitioners, and which principles they have apparently lost sight of.

The Findings of Fact Embodied in the Verdict

There were no special interrogatories submitted to the jury. Their verdict being a general one in favor of the defendants, it must be deemed to include a finding by the jury in favor of the defendants, and against the plaintiffs, upon all the issues and questions of fact submitted to it. *Eldridge* v. *McGeorge* (C.C.A. Ark.), 99 F. (2d) 835; *Hartford Nat. Bank* v. *Gardner*, 157 N. Y. S. 849, aff'd 175 App. Div. 955; *Brockport etc. Co.* v. *Brockport*, 203 N. Y. 399.

Thus, at the very outset, we are confronted with a finding of fact that the township and the police officer were not negligent, and also with a finding of fact that both the township and the police officer were acting "in good faith" in complying with the air raid blackout rules and regulations. These were two of the issues submitted to the jury (804-811, 813-814). In other words, the Trial Court charged the jury—and correctly so—that before they could find a verdict for the plaintiffs they had to find: (1st) that Friedman was negligent, and (2nd) that he was not acting "in good faith" in complying with or carrying out his blackout orders (806, 810, 813, 814). After correctly defining the phrase "in good faith" as being "faithful to one's duty or obligation" (808), and as denoting "a state of mind" (808), and as "an honesty of intention" (809), the Trial Court again correctly reminded the jury that before they could find for the plaintiffs they had to find "that the defendants were negligent and, in addition to being negligent, did not act in good faith" (810-811).

Limited Power of the United States Supreme Court and the Circuit Court of Appeals in Reviewing Facts

In Point I of petitioners' brief it is argued that there was a preponderance of evidence establishing that police officer Friedman drove his car at 50 or 60 miles an hour, and that he failed to stop or slow down before the collision. "The proof", argues counsel, "was such as to warrant the jury finding that Friedman had been driving in a reckless manner". The answer here is, that the verdict of the jury has set at rest this question of negligence, and its findings in this regard are to be taken as conclusive in this Court.

There can be no reversal in the United States Supreme Court or in a Circuit Court of Appeals for any error in fact (28 U.S.C.A., Sec. 879).

A United States appellate court has no power in actions at law to reverse because the verdict may appear to be against the weight of the evidence. The jury's verdict constitutes a final determination of disputed facts. It may only be set aside where there is no substantial evidence to support it. *John A. Crowley Co.* v. *Clark Equip. Co.* (C.C.A. N. Y.), 263 Fed. 58; *Strouse* v. *Union Indemnity Co.* (C.C.A. N. Y.), 67 F. (2d) 528; *Friedman* v. *Decatur Corp.*, 135 F. (2d) 812.

In *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, the Court says at page 35:

> "It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the fact. * * * Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Questions Not Raised Below Are Not Reviewable

None of the questions which the petitioners raise in their petition and brief are reviewable by the United States Supreme Court since they were not properly raised and properly preserved for review in the Trial Court. Questions of law, which were not presented to, nor passed on, by the Trial Court, cannot be raised for the first time on appeal. *Western Union Tel. Co.* v. *Winland* (C.C.A. Ark.), 182 Fed. 493; *Potts* v. *City of Utica* (C.C.A. N. Y), 86 F. (2d) 616; *Strouse* v. *Union Indemnity Co.* (C.C.A. N. Y.), 67 F (2d) 528.

In applying this doctrine, it is held that the constitutionality of a statute cannot be first questioned on appeal. *Chesapeake etc. Co.* v. *McDonald,* 214 U. S. 191; *Duignan* v. *U. S.,* 274 U. S. 195; *U. S.* v. *Classic,* 313 U. S. 299; *Wabash Ry. Co.* v. *City of St. Louis* (CC.A. Mo.), 64 F. (2d) 921; *Brothers* v. *Cunningham* (C.C.A. Mo.), 189 Fed. 884; *Western Union Tel. Co.* v. *Winland* (C.C.A. Ark.), 182 Fed. 493; *In re Anderson,* 178 N. Y. 416; *Dodge* v. *Cornelius,* 168 N. Y. 242; *Delaney* v. *Brett,* 51 N. Y. 78.

Under this rule the question must be raised while the trial is in progress, and in time to allow the alleged error to be avoided or corrected. It is too late to raise the question for the first time on a motion for a new trial. *Shannon* v. *Shaffer Oil etc. Co.* (C.C.A. Okl.), 51 F. (2d) 878; *Cloquet Lumber Co.* v. *Burns* (Minn.), 222 Fed. 857.

A question is not properly raised in the Trial Court, and saved for review on appeal, unless it is presented "in an understandable way" to the District Court (*King* v. *Mutual Benefit etc. Assn.* (C.C.A. Mo.), 120 F. (2d) 296), and "with sufficient certainty and definiteness for the Court to understand clearly the precise action of the court which is attacked, or the precise action of the court which is sought to be obtained" (*Arkansas Bridge Co.* v. *Kelly etc. Co.* (C.C.A. Mo.), 282 Fed. 802 at 804). Stressing the need for explicitness on the part of counsel, if ques-

tions are to be reserved for appellate review, the Court in *Palmer* v. *Hoffman*, 318 U. S. 109, warned "objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error".

See also Rule 46 of *Federal Rules of Civil Procedure*, which permits counsel to save for review alleged errors in the rulings or orders of the Trial Court, without formal exceptions, provided he "makes known to the court the action which he desires the court to take or his objection to the action of the court", and in doing this he must also make known to the Court "his grounds therefor".

Likewise, under Rule 51 of *Federal Rules of Civil Procedure*, a party may not assign as error "the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict", and, as the rule further provides, he must state "distinctly the matter to which he objects and the grounds of his objection".

The petitioners argue that appellate courts have the power to review errors, though the point has not been raised below, if the error is a plain one and if injustice will result. In this connection they cite *Hormel* v. *Helvering*, 312 U. S. 552, and other cases.

The decision in *Hormel* v. *Helvering* (supra) does not indicate any intention on the part of the Supreme Court to abandon the general rule. That case dealt with an exceptional situation in which it clearly appeared that a change in the interpretation of controlling law, occurring after the case was tried, but before it came up for review, required, as a plain matter of justice, a different result than that which had obtained in the Board of Tax Appeals.

The rule which permits an appellate court to notice errors, not brought to the attention of the Trial Court, has no application in the instant case. The rule covering those exceptional cases is stated in the following language in *U. S.* v. *Atkinson*, 297 U. S. 157 at 159:

> "The verdict of a jury will not ordinarily be set aside for error not brought to the attention of the

trial court. This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact. *Beaver* v. *Taylor,* 93 U. S. 46; *Allis* v. *United States,* 155 U. S. 117, 122; *United States* v. *United States Fidelity & Guarantee Co.,* 236 U. S. 512, 529; *Guerini Stone Co.* v. *Carlin Construction Co.,* 248 U. S. 334; *Pennsylvania Railroad Co.* v. *Minds,* 250 U. S. 368, 375; *Burns* v. *United States,* 274 U. S. 328, 336; see *Shannon* v. *Shaffer Oil & Refining Co.* (CCA), 51 F. (2d) 878, 880. * * * In exceptional circumstances, especially in criminal cases, appellate courts in the public interest may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings. See *New York Central R. Co.* v. *Johnson,* 279 U. S. 310, 318; *Brasfield* v. *United States,* 272 U. S. 448. But no such case is presented here. The judgment must be affirmed for the reason that the error assigned was not made the subject of appropriate exception or request to charge upon the trial."

POINT II

That neither the town nor the police officer were negligent, and that both were acting in "good faith" in the blackout, was established by substantial evidence.

Both the town and police officer were immune from liability under New York War Emergency Act.

The jury's verdict is supported by substantial evidence establishing that neither the town nor the police officer were negligent, and that both were acting in "good faith" in the blackout. Both the town and the police officer were immune from liability under *New York State War Emergency Act.*

This unfortunate accident occurred on November 22, 1943, at about 9.35 P. M. (547), at a time when both the township and the police officer were sincerely endeavoring to comply with an air raid blackout regulation and order.

The signals for the blackout were sent out by the U. S. Army (282, 284, 294). These signals came from the Army, in the first instance, because it had the facilities to determine the approach of enemy airplanes (285-288).

The Army sent the signals to a district warning center in Rockland County, and they were then sent out by telephone and radio to the different communities (240-242). The Rockland County Director of Civilian Protection explained, that the first signal (yellow), which the Army sent out, was a warning that enemy airplanes are "expected", and that the second signal (blue) "means they are closer", and that the third signal (red) means "they are very close indeed" (285-288).

He also explained, that the first signal (yellow) was a silent signal received in the warning center, and from there sent out to the different communities so that the heads of various departments would alert themselves (242-246). The second (blue) signal was a signal for the sounding of the public audible alarms, and when this second (blue) signal was sounded people were required to get off the streets and extinguish all lights in buildings. However, highway lights remained lighted, and traffic was permitted to continue moving, but with auto lights on low beam (242-246, 267-270). The second (blue) signal, which was an audible alarm, required all civilian protection personnel to report at once to their stations (267). The third (red) signal, which was also an audible alarm, indicated a total blackout, and required the extinguishment of all lights, including highway lights, and motorists were required to put out the lights on their vehicles, and pull off the road (242-246, 267-270).

Under Order No. 17 of the *New York State War Council* (Plffs.' Ex. 10; 857-861), the speed of motor vehicles was

limited for distances in excess of one-quarter of a mile to thirty-five miles per hour. However, the provisions of Order No. 17 did not apply to

> "Any motor vehicle driven or operated by or under the direction of the military or naval forces of the United States, or State military forces organized pursuant to Section 61 of the National Defense Act, as amended;
>
> Any motor vehicle when driven or operated in an emergency for the protection or preservation of life, health, or for public safety;
>
> Provided, that this paragraph shall not be so construed as to authorize any such motor vehicle to be driven or operated at a rate of speed in excess of that which is reasonable under conditions prevailing at such time" (859-861).

On the evening of November 22, 1943, the Army flashed a yellow (silent) signal to the district warning center in Rockland County, and this was followed by a second (blue) signal, calling for the sounding of a public alarm in the different county centers (258-263). This blue or audible signal was sounded in Nyack at 9.28 P. M. (744-750). When this alarm sounded, police officer Friedman was in a drug store in Nyack (473). He was in uniform, but off duty (528-529), subject to call (555). Under the rules of the police department, he was subject to call at any time (725). He had specific orders from the chief of police to report promptly to the police headquarters at Sparkill whenever an air raid signal was sounded (474, 476, 732), in order that he might perform desk duty there during a blackout (471, 476). All police activities under the Civil Defense Program were directly under the supervision of the chief of police of this area, and the chief of police, in giving these directions and orders to police officer Friedman, was carrying out the regulations and orders, which he had received from the State Director and County Director of Civilian Protection (p. 308).

When Friedman heard the siren at 9.28 P. M., he did not know whether it was a signal actually announcing the approach of enemy airplanes, or a practice blackout (645). In compliance with the orders he had received, he left the drug store in Nyack at once (646), went directly to the opposite side of the street, where his own car was parked (476, 646, 716), and proceeded southerly in the direction of the Sparkill police headquarters, which was a little over five miles distant from the drug store in Nyack (644). He took the straightest and most direct route to Sparkill (529, 656). There was no delay on his part, and there was no other purpose in his mission at the time. He was responding "with the sincere purpose" of helping carry out the blackout (663).

Friedman proceeded south along Route 9-W, a two-lane concrete highway, with asphalt shoulders on each side (166). Along the easterly side of this road, and on every fourth pole (every 500 or 600 feet) was a 47-watt light bulb (298, 299, 304, 310), affixed to an arm 25 or 30 feet above the highway (301).

As he drove south, he was alone in the car (477). On reaching the Village of Piermont, he came to a little rise or knoll in the road (485-490). This was over 300 feet north of the point of the accident (493, 696). Friedman, on reaching this rise or knoll in the road, brought his car almost to a full stop at that point to let another car, which was straddled across the road, back out of his way (485-490). He then continued south, and passed two cars in succession going north, with their bright lights on (485-490). As the last car "passed me it blinded me just for the time", says Friedman (650), and immediately "I saw a shadow, and in that instant I felt an impact of something against the car" (486). He felt this impact "almost directly" after passing the last northbound car (648). When he was blinded by these lights, he slowed down by taking his foot off the accelerator (652), but immediately "I saw a shadow and in that instant I felt an impact of something against the car" (486).

Friedman testified that his automobile was equipped with three sets of lights, namely, parking lights, riding lights and bright lights, and that at the time of the accident he had his riding lights on (492). He was required under the regulations to travel with depressed lights (270). He fixed the speed of his car as between 30 and 35 miles per hour (501). That he was not going at an excessive rate of speed is borne out by the fact that he stopped his car within 30 to 40 feet after he felt the impact (503, 507, 549).

Before the impact he saw no flashlights ahead of him (554), and did not know that these soldiers were marching three abreast in a southerly direction along the westerly side of this highway. He had never previously observed troops marching along Route 9-W (669). Although these soldiers had orders from their colonel (321, 323) to march three abreast in the direction of traffic, instead of against it as the laws of New York required, and even though they were ordered to do this at night and along the most traveled road in Rockland County, it will be noted that they were not carrying any flashlights, lanterns or lights of any kind (407, 408). On their back they were carrying a full field pack, weighing about 55 or 60 pounds (408-410). Each wore an OD uniform and a steel helmet, but this was painted so that it would not reflect light rays, and in order to make it dull in appearance (412).

The only measure taken to protect this column of soldiers from collision with passing vehicles was to have the officers in the rear of the column wave their hands at passing vehicles and yell. At least, this is all that was done on the night in question (383).

From the drug store in Nyack to the place of the accident was about 4½ miles (661). The accident occurred about 9.35 P. M. (547). From the place of the accident to the Sparkill police headquarters was a little over ½ mile (658).

As heretofore pointed out, Friedman stopped his car within 30 to 40 feet after he felt the impact (503, 507, 549). He stopped the car on the easterly lane, got out, and then, realizing that he had collided with the soldiers, he ran back and moved his car to the south on the east side of the road, about 30 feet from where he had stopped (485-490, 549). Then he went back immediately and borrowed a car from a woman who was at the scene of the accident, and then proceeded on in the direction of Sparkill, and before reaching his headquarters at Sparkill, and when about ¼ of a mile south of the scene of the accident, the red signal sounded and the lights went out (485-490, 712). The red alarm sounded at Sparkill at 9.37 P. M. (736). When Friedman reached the police headquarters at Sparkill, he immediately notified the Provost Marshal and the Nyack Hospital of the accident, and then returned to the scene of the accident (552).

There is nothing in this resumé of Friedman's story to indicate negligence. Our adversaries say that Sergeant Powell, one of the plaintiffs, fixed the speed of Friedman's car at 50 or 60 miles an hour (384), but when Powell was cross-examined he admitted that he was estimating this speed without being able to see the Friedman automobile itself, and by merely looking around at the oncoming headlights (422, 423, 426).

The other witnesses called to establish negligence were Wallace K. Nunn, Sergeant Frank T. Vadala and Lieutenant Edward Walters.

The witness Nunn was not able to supply any evidence as to speed or other negligence, because all he heard was a noise behind him, and the next thing he remembered he was struck (434-435).

The witness Vadala did say that the Friedman car was coming fast (574), but he was unable to state whether the vehicle slowed down as it approached the column of soldiers (576).

The witness Walters admitted that he did not see the Friedman automobile (605), and that the first thing he remembered was the collision behind him, and then he was struck (606).

Our adversaries' characterization of Friedman's conduct as reckless and wanton finds no support in the evidence.

Friedman, as a police officer, sincerely trying to get to his post at Sparkill in this "emergency", and driving at 30 to 35 miles per hour, was proceeding at a rate of speed which was "reasonable under conditions prevailing at such time" (*Order No. 17 of N. Y. State War Council*, 860, 861).

On this question of speed, it should also be noted that the *War Emergency Act* (Sec. 101, subds. 2, 3), providing penalties for any person who violates any "rule, regulation or order concerning * * * the movement and cessation of * * * vehicular traffic", excluded "exempt persons" from liability, even though the rule, regulation or order was "willfully and intentionally" violated. An "exempt person" included "any member of a municipal or volunteer agency" (Sec. 100). Thus, police officer Friedman was not subject to any penalty even though he "willfully and intentionally" violated a "rule, regulation or order concerning * * * the movement and cessation of * * * vehicular traffic" (Sec. 101, subds. 2, 3). Note also that the New York State *Vehicle & Traffic Law* (Sec. 56), in fixing a maximum speed limit of 35 miles an hour, made certain to provide that such speed limit did "not apply to any law enforcement officer while engaged in the performance of his duties".

And while "reckless driving" is declared to be a misdemeanor under Sec. 58 of the *Vehicle & Traffic Law*, it will be observed that "fire and police vehicles" (Sec. 2, subd. 8) are excluded from the phrase "motor vehicle" found in the reckless driving section (Sec. 58). And the Courts of New York have held, that one cannot be convicted of "reckless driving" upon proof of speed alone. In other words, there has to be "evidence of other facts and circumstances showing that the person or property of

others was being endangered" (*People* v. *Carrie,* 122 Misc. 753, 757). New York also holds that a conviction under *Penal Law,* Sec. 1053-A, for "criminal negligence in operation of vehicle resulting in death" cannot be sustained upon proof of speed alone. There must be other circumstances showing a "reckless disregard by the accused of the consequences of his conduct and his indifference to the rights of others" (*People* v. *Gardner,* 255 App. Div. 683 at 687).

To say that Friedman knew that soldiers from Camp Shanks marched on Route 9-W at night and that, with this knowledge, he continued to drive without vision, and while blinded by the passing headlights, and that he did not stop or slow down, is to ignore the evidence which shows that Friedman, although familiar with Route 9-W, had never observed troops marching on this highway before the night in question (669), and is to ignore the further fact that no appreciable period of time elapsed between the so-called blinding of Friedman and the impact with the soldiers. It happened "almost directly after I passed" the last car, says Friedman (648). Furthermore, in that instant, and as soon as the lights blinded him, he took his foot off the accelerator and thus slowed down (652). Therefore, the rule which counsel cites, to the effect that one blinded by headlights must stop or slow down so that he will have his car under control and can promptly stop (Pet. Brief, p. 12), was in fact complied with by Friedman. He stopped his car within 30 to 40 feet (503, 507, 549), and that would certainly indicate full control of the car and promptness in stopping.

N. Y. State War Emergency Act

Under the *New York State War Emergency Act* neither the township nor the police officer may be held liable for the unfortunate death and the personal injuries, which grew out of Friedman's activity on this night.

The pertinent section of the Act is Sec. 40, which reads as follows:

"*Sec. 40. Immunity from liability.*

1. Neither the state nor any municipality thereof, nor their agencies, agents or representatives, nor any member of a municipal or volunteer agency, nor any individual, partnership, corporation, association, trustee, receiver or any of the agents thereof, in good faith carrying out, complying with or attempting to comply with any law or duly promulgated rule, regulation or order as defined in subdivision eleven of section two of this act or any federal law or any order issued by federal or state military authorities relating to civilian protection, shall be liable for any injury or death to persons or damage to property as the result of such activity."

The defendant Town of Orangetown, being a municipal corporation under the provisions of the *Town Law*, falls within the class of persons and parties immunized under this section. That the Town of Orangetown is a municipal corporation, under the Laws of the State of New York, is alleged in the complaint (8) and admitted in the answers.

That police officer Friedman was also given immunity in his individual capacty is also apparent from the phraseology of the statute, which makes reference to "*agents*" and "*any member of a municipal * * * agency*", plus the use of the phrase "*any individual*".

See, also, Sec. 2, subdvision 7, of the Act, where in its definition of "*municipal agencies*" it includes "*police, * * * and all other regular agencies of a * * * town*". Thus, there can be no question as to both of these defendants falling within the list of persons who are given immunity by Sec. 40 of the *New York State War Emergency Act*.

The phraseology of Sec. 40 unmistakably shows an intent by the Legislature to give immunity to a municipality and its agents from actions for death and for negligence, such as are here involved. See the catchline "*Immunity from liability*", and the clause "*any injury or death to persons or damage to property*".

The general intent of the Legislature to throw a protective cloak around a municipality and its agents during the emergency is apparent from other provisions of the Act. See Sec. 53, subdivision 2, granting immunity from liability where police or other employees are engaged in rendering outside aid, and Sec. 63-A, subdivision 6, of the Act, where immunity from liabilty was also given to a municipality in the event that streets or highways had to be closed.

The evident purpose of the immunity provisions of Sec. 40 was to stimulate all of the regular municipal agencies of the State and volunteer agencies in coming to the defense of the Country. Fairness and justice would dictate that those who were aiding and cooperating for the common good, and the protection of all, should not be subjected to civil liability as a result of their activity in "complying with or attempting to comply with any law or duly promulgated rule, regulation or order as defined in subdivision eleven of section two of this Act".

The phrase last quoted is defined in Sec. 2, subd. 11 as follows:

> "'*Duly promulgated rule, regulation or order*' shall mean any rule or order adopted or issued by the state council or by a local council, or any regulation or order adopted or issued by the state director, or a local director pursuant to law."

The Legislature, in enacting Sec. 40 of the *War Emergency Act*, was endeavoring to do, for those engaged in activities relating to civilian protection, what it had done for members of the State militia who are ordered into active service. Under Sec. 15 of the *Military Law* of the State of New York, members of the militia in active service are relieved of civil and criminal liability "for any act or acts done by them in the performance of their duty".

It should also be borne in mind, that neither the Town of Orangetown nor police officer Friedman had any choice

in the matter of assisting and cooperating in this blackout on the night of November 22, 1943. The State Council had the power not only to "*request*", but also "*obtain*", such cooperation and assistance from any agency or official of the town as it might require (Sec. 7, subd. 10), and the Town of Orangetown and police officer Friedman had to comply (Sec. 11).

It should be further observed, that under Sec. 16 of the Act, the supervisor of the Town of Orangetown was made a "deputy county director of civilian protection", and as such "local director" (Sec. 2, subd. 6) he had not only the power but the duty "to direct all municipal and volunteer agencies under his jurisdiction" (Sec. 19, subd. 10).

As to the Phrase "In Good Faith"

Petitioners in Point I of their brief (pp. 13-18) complain about the Court's interpretation of the phrase "in good faith" which is found in Sec. 40 of the *War Emergency Act*. They argue that the police officer could not have been acting "in good faith" if he were "guilty of driving recklessly". They tell us that "reasonableness of conduct properly is the test of 'good faith'" (Pet. Brief, p. 15).

The substance of this argument is that the Legislature, in using this phrase "in good faith" was really saying "in a careful manner" or "in a prudent manner". As our adversaries interpret this phrase, a high degree of negligence, or, in other words, gross negligence, would indicate lack of "good faith".

Counsel claims he preserved this question for review by submitting three requests to charge (Requests XI, XII and XIII, at fols. 840-841).

It should be observed that he took no formal exception to the Trial Court's charge with respect to the meaning of the phrase "in good faith" (823-833). We submit that his requests to charge Nos. XI, XII and XIII were not "sufficiently specific to bring into focus the precise nature of

the alleged error" now assigned (*Palmer* v. *Hoffman,* 318 U. S. 109, and see other cases in our Point I, *supra*).

In any event, there was no error committed by the Trial Judge. He correctly charged the jury that before they could find a verdict for the plaintiffs they had to find: (1st) that Friedman was negligent, and (2nd) that he was not acting "in good faith" in complying with or carrying out his blackout orders (806, 810, 813, 814). He then correctly defined the phrase "in good faith" as being "faithful to one's duty or obligation" (808), and as denoting "a state of mind" (808), and as "an honesty of intention" (809).

The Legislature, in using the phrase "in good faith", enacted a meaningless statute if this phrase is to be treated as synonymous with "in a careful manner" or "in a prudent manner".

The obvious purpose of the statute was to give immunity from liability to a municipality, and its policemen and agents, for "any injury or death to persons or damage to property", as the result of their activities during blackouts. It was, therefore, negligent acts or negligent "activity", be it slight or gross, which Sec. 40 contemplated.

The Legislature, in using the phrase "in good faith", was referring only to the sincerity of the effort, or the bona fides of the municipality and its agents. It was using the phrase in its common, ordinary meaning as connoting honesty of purpose and faithfulness to one's duty or obligation. The Legislature was referring to the state of mind of the actor. If the municipality and its agents were honestly aiding and assisting in a blackout, they were not to lose their immunity from liability because, in their honest effort to assist, they committed a negligent act.

Was the actor primarily moved into action by a sincere motive and mind? Was his mind really on the blackout or, as in *Jones* v. *Gray,* 267 App. Div. 242, was his mind on a female party? Was the blackout just a good excuse for the officer to have a necking or drinking party or a joy ride with some girls as in the *Gray* case? In the *Gray*

case, on which our adversaries so strongly rely, the New York court had no choice but to find that air warden Gray, when he caused injury by the negligent operation of his car, was thinking not of the blackout, but of a "blackout party" with the girls. Examine the record in the *Gray* case, and it will be found that Gray received word of the impending blackout while he was in a store. This was almost a half hour before the accident. Gray was told that he was wanted immediately at Glenford to perform his duties as an air raid warden. Instead of answering this emergency phone call, he instructed the girl who answered the phone to say that he had left. Thus, at the very start Gray was attempting to evade his duty. Gray, instead of promptly proceeding to his post, remained in the store and leisurely consumed an ice cream soda. He had other reasons for lingering in the store. He waited about a quarter of an hour until a girl and a boy drove two miles to the home of another girl, so that she might be brought to the store, and so that the two couples could go on a "real blackout" party. Obviously, it could not be said that Gray was honestly trying to perform his duties as an air raid warden.

No such elements appear here. Friedman, in the instant case, had this unfortunate accident when his mind and his thoughts were concentrated solely on reaching his blackout post at Sparkill. The speed of his car, whether slow or fast, had nothing to do with the question of his good faith in complying with the blackout orders.

The phrase "in good faith" is not defined in the statute. In *R. L. Witters* v. *Ebsary Gypsum Co.*, 93 F. (2d) 746, 748, the words "good faith" were before the Court for definition. It was there held that, in the absence of statutory definition, the meaning of the term

> "must be drawn from the meaning of the words themselves as interpreted by the context in which they are used, the purpose back of the statute, the mischiefs it was enacted to prevent, the results it was enacted to accomplish."

And so, in the instant case, we must find the meaning of this phrase in the context of Sec. 40, the purposes back of the *War Emergency Act* itself, and the results which that Act was trying to accomplish, namely, the lifting of liability from the backs of municipalities and their agents while cooperating in blackouts, and in other activities related to the war effort.

In common usage the words "good faith" mean state of mind denoting honesty of purpose, and mean faithful to one's duty or obligation. *In re Coleman,* 21 Fed. Supp. 923, 924; *In re Vater,* 14 Fed. Supp. 631, 632.

The phrase "good faith" was discussed in *Tipton* v. *Sands,* 60 Pac. (2d) 662, 670, 103 Mont. 1, in this language:

> "Although in its original and popular sense the term denotes honesty of purpose and absence of bad faith, yet it is popularly used to denote the actual existing state of mind without regard to what it should be from given standards of law and reason."

For further citations to the effect that the phrase "good faith" refers to one's actual existing state of mind, and without regard to what it should be from given standards of law and reason, see *Woodward* v. *Blanchard,* 16 Ill. 424, 432, 433; *Searl* v. *Lake County School,* 133 U. S. 533, 563; *Wright* v. *Mattison,* 18 How. (U. S.) 50, 59.

And in *Vesper* v. *Ashton,* 118 S. W. (2d) 84, 89, 233 Mo. App. 204, the Court said, in passing on the meaning of the words "good faith":

> "The legal presumption as to knowledge of the law has no place in determining the question."

In *Stufflebeam* v. *DeLashmutt,* 101 Fed. 367, 370, the Court said:

> "Lack of diligence does not necessarily involve absence of good faith."

Probably the best clue as to what the New York State Legislature meant by using the phrase "in good faith" in the *War Emergency Act* is to be found by examining another statute passed by the same Legislature, namely, the *General Business Law of New York*. That law deals, among other things, with the rights and duties of warehousemen with reference to goods stored with them. The phrase "in good faith" is used in numerous places in that statute. Sec. 142, subd. 2, of the *General Business Law* defines the phrase in this manner:

> "A thing is done 'in good faith' within the meaning of this article when it is in fact done honestly, whether it be done negligently or not."

This last quoted definition is the only definition which makes any sense. This is the meaning which the Legislature also had in mind when it used the phrase in the *War Emergency Act*.

Counsel thinks that by characterizing the speed of the Friedman car as "reckless" and "wanton", he is lifting the case out of the immunity provision of the *War Emergency Act*. Those words are not necessarily incompatible with "good faith", as Augustus N. Hand, C. J., points out in the prevailing opinion of the Court below, at page 311:

> "It is argued that reckless and wanton speed are incompatible with good faith, but this is not necessarily so for at most they would only be evidence in some situations that there was no honest attempt to comply with orders but other possible motives. The judge said to the jury that 'Good faith denotes honesty of purpose. It is said to be a state of mind.' If the uncontradicted evidence did not conclusively demonstrate the good faith of Friedman the jury had before it all the testimony as to reckless speed and could give it such weight as it deemed proper. No charge was given or requested that reckless speed was not evidence bearing on good faith."

Nor does counsel lift the case out of the immunity provision of the *War Emergency Act* by characterizing Friedman's conduct as "culpable negligence", a phrase which he used in the Circuit Court of Appeals. That phrase does not imply "any malice or recklessness, or anything further than a failure to exercise the care which reasonable prudence would suggest" (*Noonan* v. *Luther,* 119 App. Div. 701, 703). And that "gross negligence" does not imply intentional wrongdoing or bad faith, see *Louisville and Nashville R. R. Co.* v. *McCoy,* 81 Ky. 403.

Gaglio v. *City of New York,* 143 F. (2d) 904, cited by petitioners, bears no analogy to the instant case and, therefore, throws no light on the question here involved. There the issue involved was the good faith of the City of New York and its mayor in complying with dim-out regulations at the elevated station where plaintiff suffered injuries because of alleged insufficient lighting. Incidentally, the Court there held that there was no evidence in the case showing lack of "good faith" on the part of the city, in its compliance with the Army regulations, and it therefore affirmed the action of the Trial Court in directing judgment for the city.

One further word with reference to the claim that the Trial Court erred in refusing to charge the jury in the language embodied in plaintiffs' Requests Nos. XI, XII and XIII (839-841). The substance of all of these requests was that neither the *War Emergency Act* nor the orders given to Friedman to report promptly to his police headquarters in Sparkill, gave him the right to operate a motor vehicle recklessly and without regard to speed and the safety of persons on the highway. Since all these matters had been fully covered in the main charge (792-811), the Trial Court refused to charge in the language formulated by counsel (830-831).

Having fully and thoroughly explained the principles of law to the jury in his own language, the Trial Judge was not required to repeat them in language framed by counsel.

Lawson v. *Metropolitan Street Ry. Co.*, 40 App. Div. 307; *Conley* v. *Meeker*, 85 N. Y. 618; *Baltimore & O. R. R.* v. *Corbin*, 118 F. (2d) 9.

Section 40 of New York War Emergency Act is constitutional. This question not reviewable here since it was not raised in Trial Court.

Petitioners attack the constitutionality of Sec. 40 of the *New York War Emergency Act* in Points I and V of their brief (pp. 18, 19, 20, 30, 31). At page 3 of their petition they claim that this is the "principal question sought to be reviewed", and at page 4 of their petition this question is the only one which is supported by any alleged reason for the allowance of the writ. Yet, the petitioners fail to make reference to any portion of the record wherein they raised this question in the Trial Court. The fact is, that it was not raised in, presented to, or determined by, the Trial Court, and it, therefore, cannot be raised now in the United States Supreme Court. (See the authorities cited in our Point I *supra*, particularly those holding that even the constitutionality of a statute cannot be first questioned on appeal.)

Counsel for the plaintiffs never mentioned anything about the constitutionality of this statute while the trial was in progress. He waited until the trial had ended and then, when he found the jury had returned a verdict against him, and when he began to think about raising questions on a motion for a new trial, and after he had made such motion, he indulged in a colloquy with the Trial Judge, and then, for the first time, mentioned this question of constitutionality (837). He filed an 18-page brief with the Trial Judge in support of his motion to set aside the verdict, but nowhere in that brief did he, directly or indirectly, make any reference to the constitutionality of the *War Emergency Act*. Even though he had urged this question of constitutionality on his motion for a new trial, that would have been too late, under the authorities which we cite in

Point I (*supra*). He was required to raise it while the trial was in progress.

However, if the question were open for review by this Court, it would have to decide in favor of the constitutionality of the statute. Petitioners contend that Sec. 40 of the *New York War Emergency Act* abrogates the right of action for injuries resulting in death, and therefore is violative of Art. I, Sec. 16, of the *New York State Constitution*, which states that such right of action "shall never be abrogated" (Pet. Brief, p. 30), and they also contend that a common law action in negligence for personal injuries cannot be abrogated without providing some adequate substitute (Pet. Brief, p. 18).

Before we refer to the authorities upholding the constitutionality of this statute, we call to the Court's attention the fact that Sec. 40 of the *New York War Emergency Act* does not abrogate either a cause of action for death or a cause of action in negligence for personal injuries. Both types of action are still maintainable under the *New York War Emergency Act*, in cases where the defendant is not acting "in good faith" in carrying out any law, rule, regulation or order relating to civilian protection. The right of action remains, but with this limitation, when the defendant happens to fall within the class of persons enumerated in Sec. 40.

Let us assume, for the sake of discussion, that Sec. 40 of the *New York War Emergency Act* did abrogate the cause of action for death, and the cause of action in negligence for personal injuries. If the Legislature had done so, its action would still have been constitutional as a valid exercise of the State's police power in a war emergency.

When Pearl Harbor was attacked on December 7, 1941, and when a state of war was declared immediately thereafter by the federal government, the likelihood of bombing attacks from enemy airplanes, and other war hazards, was uppermost in the minds of the people. The State of New York acted promptly and undertook to put itself on a war basis in support of the national government by enacting

the *War Emergency Act*, which became effective May 1, 1942. That the Act was designed as a war measure adequately appears from the title thereof, and its various provisions dealing with activities relating to State and National defense, and the mobilization and coordination of police, fire-fighting and other welfare forces of the State for the protection of the people against air raids, shelling and other enemy action. It was not legislation of a permanent character, as will be observed from the fact that the State War Council, which it set up, was to be only "a temporary state commission" (Sec. 5). The temporary character of the legislation, as a war measure, is further emphasized by the fact that it was to continue in force and effect only until July 1, 1944 (Sec. 119).

When war strikes, and the very heart and soul of the community is threatened, peace-time measures and peace-time regulations cannot possibly provide protection and security for the State and its inhabitants against enemy hordes who are threatening attack by air, land and sea. In times of such emergency only the exercise by the sovereign of its inherent police powers can provide the needed protection and security. The police power is an inherent attribute of sovereignty, and all rights are held subject to its exercise, and this includes rights guaranteed by a State Constitution. Since the Constitution presupposes the existence of the police power, it is to be construed with reference to that fact. It is the least limitable of the powers of government. Any loss occasioned by the invasion of individual rights by the State, in the legitimate exercise of the police power, is *damnum absque injuria*. In times of great public necessity the State, in exercising this reserve power, can override or nullify constitutional limitations.

In *Litchfield* v. *Bond*, 186 N. Y. 66, the Court, in pointing out that constitutional limitations may be nullified in times of great emergency by the exercise of the State's police power, uses the following language at page 73:

> "It is to be observed, moreover, that the police power, which is concededly an inherent attribute of sovereignty, should be permitted to override or nullify our constitutional limitations only in cases of the highest public necessity. That governmental power, like every other, is subject to the Constitution, and when it is paramount it is because it is not limited by the Constitution, or because some immediate and overruling emergency calls for the application of the maxim *salus populi suprema lex*."

In *New York & New Eng. R. R. Co.* v. *Bristol*, 151 U. S. 556, the Court, after pointing out that the constitutional inhibitions against impairment of contract obligations, deprivation of property without due process, and the equal protection of the laws by the states, are not violated by the exercise of the state's police power in securing the public safety, health and morals, has this to say at page 567:

> "The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury."

In pointing out that the Constitution presupposes the existence of the police power, and is to be construed with reference to that fact, the Court, in *Village of Carthage* v. *Frederick*, 122 N. Y. 268, said at page 273:

> "All authorities agree that the Constitution presupposes the existence of the police power, and is to be construed with reference to that fact."

And quoting from *Sedgwick on Stat. & Const. Law*, 435, the Court continues at page 274:

> "It has always been held that the Legislature may make police regulations, although they may interfere with the full enjoyment of private property and though no compensation is given."

And the Court, continuing with a quotation from *Tiedeman's Lim. of Police Power*, 12, says at page 274:

> "Where the letter of the Constitution would prohibit police regulation, which by all the principles of constitutional government have been recognized as beneficent and permissible restrictions upon the individual liberty of action, such regulations will be upheld by the courts on the ground that the framers of the Constitution could not possibly have intended to deprive the government of so salutary a power and hence the spirit of the Constitution permits such legislation, although a strict construction of the letter prohibits."

And continuing with a quotation from *Dillon on Munic. Corp.*, the Court further states at page 274:

> "It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. * * * If one suffers injury it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefitts which the regulations are intended and calculated to secure."

In *People* v. *Perretta*, 253 N. Y. 305, the Court says at page 309:

> "The police power is 'the least limitable of the powers of government.' (*District of Columbia* v. *Brooke*, 214 U. S. 138, 149.) It extends to all the great public needs. (*Camfield* v. *United States*, 167 U. S. 518.) The validity of police regulations must depend on the circumstances of each case and the character of the regulation, whether arbitrary or reasonable. A legitimate public purpose may always be served without regard to the constitutional limitations of due process and equal protection. (*People ex rel. Durham Realty Co.* v. *La Fetra*, 230 N. Y. 429; *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63.)"

In *Matter of Cheesebrough*, 78 N. Y. 232, the Court says at page 236:

> "The police power possessed by the State, and conferred by it upon municipal corporations, is very broad and far reaching, and it is impossible to place upon it any precise limitations. By its exercise, in many cases rights of property and of person may be interfered with and largely impaired without any compensation. * * * In cases of actual necessity, as that of preventing the spread of fire, the ravages of a pestilence, the advance of a hostile army, or any other great calamity, the private property of any individual may be lawfully taken, used or destroyed for the general good, without subjecting the actors to personal responsibility. In such cases, the rights of private property must be made subservient to the public welfare; and it is the imminent danger and the actual necessity which furnish the justification. *Salus populi suprema lex.*"

In *Peo. ex rel. Durham R. Corp.* v. *La Fetra*, 230 N. Y. 429, involving the constitutionality of a statute enacted in 1920 dealing with the emergency which arose in the housing situation in greater New York at the end of the first World War, the Court says at page 442:

> "The legislative or police power is a dynamic agency, vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirements of due process. Either the rights of property and contract must when necessary yield to the public convenience, advantage and welfare, or it must be found that the state has surrendered one of the attributes of sovereignty for which governments are founded and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare."

In considering this question, we should bear in mind that a presumption of constitutionality exists in favor of a State statute (*Davis* v. *Dept. of Labor & Industries*, 317 U. S. 249).

POINT III

There was no error in the Trial Court's charge as to the four questions enumerated in petitioner's Point II.

No reason given why these questions require a review by this Court.

These questions are not reviewable here since they were not raised in the Trial Court.

In their petition (Question II at p. 4), and in their brief (Point II at pp. 20-26), the plaintiffs (petitioners) discuss four alleged errors in the Trial Court's charge to the jury.

In neither petition nor brief, however, do they give any reason why these so-called errors of the Trial Court require the allowance of the writ and a review by the United States Supreme Court. This omission is a fatal one (*U. S. Supreme Court Rule* 38, pars. 2 and 5).

Equally fatal is their failure to inform us at what point during the course of the trial, and in what manner, they brought these so-called errors in the charge to the attention of the Trial Judge. The fact is, they raised none of these questions in the Trial Court, either by exception, objection, or request to charge (823-833). Under the authorities, which we have cited (see our Point I, *supra*), these questions, therefore, are not open for review on appeal.

In any event, the charge of the Trial Court with regard to these four questions was proper, and free of error, as we shall now undertake to point out.

The Charge as to Contributory Negligence

That the charge as to contributory negligence was proper is best evidenced by the plaintiffs' (petitioners') failure to raise any question concerning it in the Trial

Court, either by exception, objection or request to charge (823-833). They now contend (Point II, pp. 20-23), at this late hour, that the Trial Judge, having charged the jury that the soldiers were not guilty of contributory negligence in marching on the wrong side of the road, then confused them by submitting for their consideration the question of contributory negligence.

If this charge be read in its entirety, and not piecemeal, it will be found to contain a fair and correct explanation of the law as to contributory negligence, as applied to the facts of this case. There was nothing said by the Court which could possibly have misled the jury in considering this question.

Since the action was in negligence, the Court, if it was to render any aid to the jury in applying the law to the facts, had to discuss the basic question of the burden of proof. The burden of proof with respect to the five soldiers who were suing for personal injuries differed from the burden of proof in the death action, insofar as contributory negligence was concerned. In explaining the difference to the jury, the Court very properly informed them that under the laws of the State of New York "the burden of proving that the deceased was guilty of contributory negligence would be upon the defendants" (775). With reference to the five soldiers who were suing for personal injuries, the Court properly informed the jury that the burden would be upon them "to establish that they were not guilty of any contributory negligence" (774). In this connection the Court continued as follows: "Under the laws of the State of New York in a negligence action, the plaintiff is required to prove negligence on the part of the defendant and freedom from contributory negligence on the part of the plaintiff" (775).

But these general comments concerning contributory negligence were made quite specific in other parts of the charge, and the jury were emphatically told:

> "I say, these soldiers were under orders, and they were required to walk upon that side of the road where they were told to walk. * * * So they cannot be guilty of contributory negligence by reason of the fact that they did walk on the wrong side of the road, because so far as they were concerned as soldiers, the orders of the colonel and their superior officers were paramount and they had to obey them" (769).

Thus, instead of sending this issue of contributory negligence to the jury, it was lifted from the field of controversy by the Court's emphatic instruction that all six soldiers were free of negligence.

In attacking the Court's charge concerning contributory negligence counsel argues that the jury must have been misled and confused because they were told that "in determining the question of negligence of Friedman" (770) they could "consider the fact that they (soldiers) were on the so-called wrong side of the road" (770).

There was nothing erroneous in this part of the charge. The Court was here talking, not about contributory negligence, but about negligence on the part of the defendant Friedman, and the jury were told that in considering Friedman's negligence they might consider "whether he (Friedman) expected to find someone there" (770). The Court was careful to warn the jury "that would only go to the question of his (Friedman's) neglect, if any" (770).

What the Trial Court was saying to the jury, in slightly different language (at 770) was that the defendant Friedman, in driving along this highway at night, was entitled to "rely, in a measure at least, on the presumption that others will obey the law" (*Crombie* v. *O'Brien*, 178 App. Div. at 808).

See this further passage in the charge:

> "Well, you have got to determine: would he (Friedman) reasonably expect to find people on that side of the highway? I am not saying that the soldiers, by being on the wrong side, were guilty of contributory

negligence, but I say in determining his negligence you have got to determine whether in the circumstances he would reasonably expect to see people walking on the so-called wrong side of the road" (793).

The Charge as to Section 50-e of General Municipal Law

That the Trial Judge committed no error in charging the jury as to the meaning of Sec. 50-e of the *General Municipal Law*, is best evidenced by the plaintiffs' (petitioners') failure to raise any question concerning it in the Trial Court, either by exception, objection or request to charge (823-833).

At this late hour, they now contend that the Trial Court, in explaining to the jury the meaning of Sec. 50-e of the *General Municipal Law*, informed them that, while that section "makes the city, town or village liable for the negligence of the policeman or fireman", it "exonerates and exempts the police officer even though he be negligent" (783). In singling out these few words of the Trial Court (783), counsel overlooks the fact that the charge as to Sec. 50-e ran from folio 780 to folio 787, and he overlooks the fact that the Trial Court, in addition to reading that entire section of the law to the jury (780-783), did in fact charge them that both the town and the police officer were liable for the latter's negligence, if not exempt under the "good faith" provision of Sec. 40 of the *War Emergency Act*, though, under Sec. 50-e of the *General Municipal Law*, the town would save the police officer harmless from a recovery (784-785).

And so no error was committed in the Court's explanation of the wording found in Sec. 50-e.

The Charge as to the Burden of Proof on the Issue of "Good Faith"

That the charge as to the burden of proof on the issue of "good faith" was proper, is best evidenced by the plaintiffs' (petitioners') failure to raise any question concern-

ing it in the Trial Court, either by exception, objection or request to charge (823-833).

Since the answers of both defendants alleged, by way of affirmative defense, that they were acting, on the night in question, "in good faith" in carrying out the rules, regulations and orders relating to the blackout, the burden of proving their "good faith" was, obviously, upon them and not upon the plaintiffs.

In the main charge, the Trial Court inadvertently told the jury that "the burden of proof of showing the absence of good faith is on the plaintiffs" (806). However, this was corrected when counsel for the defendant, Town of Orangetown, pointed this out to the Court, and stated (825):

> "* * * what your Honor meant to say was the burden of proof of good faith was on the defendant."

to which the Court responded:

> "The Court: Yes, of course. The defendant must prove good faith. I thought I had said that. Of course that is so, if I did state otherwise."

Plaintiffs' counsel now takes the position that the Court did not correct its inadvertent statement, and that the jury were misled and confused.

This is an entirely new thought on his part. Plaintiffs' trial counsel evidently was thoroughly satisfied with the Court's correction upon the trial, for he made no further request and took no objection or exception (823-833). Presumably, he felt then that the Court had made the matter clear. If he felt otherwise, it was his duty to request further clarification at the time. (*Woods* v. *Long Island R. R. Co.*, 11 App. Div. 16, aff'd 159 N. Y. 546; *Texas & Pac. Ry. Co.* v. *Volk*, 151 U. S. 73; *Bresslin* v. *Star Co.*, 166 App. Div. 89 at p. 91; *Robinson* v. *Ins. Co. of No. Am.*, 198 N. Y. 523, at p. 525; *Hurley* v. *Olcott*, 134 App. Div. 631 at p. 639).

Even if he had asked for further instructions, the Court could not have made it any clearer.

The Charge as to Friedman's Responding to an Air-Raid Alarm Signal

The final complaint, which plaintiffs (petitioners) make about the charge of the Trial Court, is that it unduly emphasized the fact that Friedman was responding to an air-raid alarm signal (Point II, pp. 25, 26).

They lift out a sentence here (787) and a sentence there (789) from the Court's charge, and then assert that the quoted sentences place undue emphasis on the fact that Friedman was responding to an air-raid alarm signal, and they then conclude with the argument, that it was for the jury, and not the Court, to determine whether Friedman believed that he was responding to a real blackout or a practice blackout on the night in question.

If this part of the charge be read in its entirety (787-790), it will be observed that there was no undue emphasis or prejudicial statements made by the Court. In discussing the blackout, particularly whether the police officer knew it was a real blackout or a practice blackout, the Court was careful to tell the jury: "Of course, you are to decide the evidence, I am merely expressing my views" (789). And note the further admonition: "You are to decide the facts, and by referring to any particular testimony I do not intend to emphasize any particular testimony, because I say to you that it is your duty to decide this case upon the evidence and the evidence alone and nothing outside the evidence" (791). And he repeats: "It is your recollection of the evidence that is to control" (792). Again he repeats the warning: "I say again it is your recollection that is to control, because your combined recollection is necessarily better than my individual and independent recollection" (794).

The criticism which counsel now makes as to this part of the charge is another afterthought. If he felt that the charge in this respect was prejudicial, it was his duty to raise this question in the Trial Court, either by exception, objection or request to charge. This he did not do (823-833), and he may not now be heard to complain.

POINT IV

There was no undue interference by the Trial Court with plaintiffs' counsel's presentation of the case.

No reason given why this question requires a review by this Court.

This question is not reviewable here since it was not raised in the Trial Court.

In their petition (Question III at p. 4), and in their brief (Point III at p. 28), the plaintiffs (petitioners) claim that the Trial Court improperly interfered with their presentation of the case.

In neither petition nor brief, however, do they give any reason why this so-called error of the Trial Court requires allowance of the writ and a review by the United States Supreme Court. This omission is a fatal one (*U. S. Supreme Court Rule* 38, pars. 2, 5).

Equally fatal is their failure to inform us at what point during the course of the trial, and in what manner, they brought this so-called error to the attention of the Trial Judge. The fact is, they raised no such question in the Trial Court, either by exception, objection or request to charge (823-833). Under the authorities, which we have cited (see our Point I *supra*), this question, therefore, is not open for review on appeal.

In any event, there was no undue interference with counsel's presentation of the case. He now points to about 25 places in the record, which he claims indicate improper interference by the Trial Judge and defense counsel, with his presentation of the case. In each of the instances cited it will be observed that plaintiffs' counsel made no complaint or objection about the interruption, and, as a matter of fact, these so-called interruptions were merely colloquies between the Trial Judge and counsel, or questions propounded in an effort to clarify the issues or to expedite the trial of the case. In none of the instances relied on

can there be found any language or words used by the Trial Judge, which, directly or indirectly, reflect any attitude of hostility or bias toward plaintiffs' counsel; nor were any of the interruptions by defense counsel improper.

POINT V

Summation of defense counsel presents no reversible error.

No reason given why this question requires a review by this Court.

This question is not reviewable here since it was not properly raised in the Trial Court.

In their petition (Question IV at p. 5), and in their brief (Point IV at pp. 29, 30), the plaintiffs (petitioners) assert that counsel for the Town of Orangetown improperly appealed to the jury's prejudice in his summation.

In neither petition nor brief, however, do they give any reason why this question requires the allowance of the writ and a review by the United States Supreme Court. This omission is a fatal one (*U. S. Supreme Court Rule* 38, pars. 2, 5).

It is claimed that the verdict went against the plaintiffs because Mr. Mack, in his summation on behalf of the defendant Township, intimated that the United States Government should compensate the plaintiffs rather than these defendants (754).

We submit that the summation of Mr. Mack was a fair presentation of the defendants' position and did not prejudice the plaintiffs, and did not lead the jury astray.

As heretofore pointed out, the jury could not find a verdict for the plaintiffs unless they first found negligence on the part of the defendants, and, secondly, found that there was a lack of "good faith" on the defendants' part in their participation in the blackout on the night in question.

"There was no evidence whatever of negligence produced upon the trial", was the observation of the Trial Court in its written opinion denying plaintiffs' motion for a new trial (881). Nor was there a scintilla of evidence introduced which showed bad faith or lack of "good faith" on the part of officer Friedman, or on the part of the township.

Had the jury returned a verdict for the plaintiffs, it would have been a verdict without evidence to support it, and, as the Trial Court further noted, "this court would have been compelled to set aside a verdict for the plaintiffs, if the jury had returned such" (881).

Without this essential proof of negligence, and without essential proof of bad faith or lack of "good faith" in the record, the jury had no alternative under the law, and were in duty bound to find for the defendants. The case did not need, and does not contain, an inflammatory address by defense counsel.

It is true that plaintiffs' counsel did interrupt Mr. Mack at one point in the latter's summation, after reference had been made to these soldiers and the United States Government. The following appears in the record (754-755):

> "Mr. Sargent: I object to that statement, if the Court please, with all due respect to Mr. Mack. I don't think that that is a fair statement, because we don't know that as a fact.
>
> The Court: Well——
>
> Mr. Mack: I am going to tell them why.
>
> The Court: Of course they don't pay the damages.
>
> Mr. Mack: No.
>
> The Court: No, the Government doesn't pay any damages.
>
> Mr. Mack: No, the Government is not responsible in damages, that is true. * * *"

Thus the jury were informed, not only by the Court itself, but also by Mr. Mack, that the "Government is not responsible in damages".

If, as counsel now contends, the remarks of Mr. Mack were so destructive of the plaintiffs' rights, it is signifi-

cant that he interposed no further objection or exception at the time of the quoted colloquy, nor did he ask for the withdrawal of a juror and the declaring of a mistrial.

Plaintiffs' trial counsel is not a novice; he has had much experience in the trial of cases. If his causes of action were being subjected to foul attack by opposing counsel, he would have promptly taken the necessary steps to vindicate the rights of his clients with an immediate application for a mistrial, or, at least, he would have insisted, at the time, that the Court more fully explain the matter to the jury. The assertion now of prejudice and injury by counsel is but an afterthought.

Care was taken by the Trial Judge to warn the jury that their duty was to decide the issues solely on the evidence produced in open court, and to guard against bias, prejudice or sympathy. Just to quote a few passages from the main charge:

> "It is your duty, under the law, to be fair, to be impartial, to lay aside considerations of prejudice, bias or sympathy" (764).
>
> "* * * it is your duty to decide this case upon the evidence and the evidence alone and nothing outside the evidence" (791).
>
> "You may not consider that on the basis of prejudice, bias or sympathy, * * *" (811).
>
> "You can't consider, on the other hand, that perhaps there might be some legislation paying these boys who were injured. You can't consider anything like that, because that would be guess, surmise and speculation" (812).
>
> "You can't consider that if they were disabled, if insurance had been taken out, that they were going to get some insurance. You can't consider those things. That is all guess, surmise and speculation. You cannot decide this case upon that. You can only decide it upon the evidence" (812).

After the main charge was concluded, and at the request of plaintiffs' counsel, the Court further charged the jury as follows:

> "The Court: The jury must disregard any reference made by defendants' counsel respecting the alleged claims of the plaintiffs against the government of the United States" (829).
>
> "* * * You are not to speculate as to whether the government should make provision for these men or whether these men have any insurance or anything of that kind. Don't base your decision upon guess, surmise or speculation" (829).

This iteration and reiteration by the Trial Judge of the jury's duty to confine their deliberations solely to the evidence, and to cast aside bias, prejudice and extraneous matters, were ample safeguards of the rights of all parties.

The presumption is that the jury obeyed the Court's instructions (46 *Corpus Juris*, pp. 105-108; *Strombald* v. *Hanover Fire Ins. Co.*, 121 Misc. 322; *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 at 243; *U. S.* v. *Nickerson* (C.C.A. Mass.), 2 F. (2d) 502).

In view of the Court's admonition, and the failure of plaintiffs' counsel to request the withdrawal of a juror or to move for a mistrial, this assignment of error is without merit (*Brooklyn Heights R. Co.* v. *Ploxin* (C.C.A. N. Y.), 294 Fed. 68; *Continental Casualty Co.* v. *Poquette* (C.C.A. Ariz.), 28 F. (2d) 958).

As stated in *Dunlop* v. *United States*, 165 U. S. 486 at 498:

> "If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand."

CONCLUSION

The petition should be denied.

Respectfully submitted,

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